85-1629

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO, AND LOCAL 100 OF THE INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO-CLC,
Petitioners,

v.

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a labor union may be held liable for a violation of Title VII of the Civil Rights Act of 1964 or of 42 U.S.C. § 1981 solely because the union failed to make "every reasonable effort" to ensure that an employer complied with Title VII.

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Petitioners,

v.

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated, *et al.*,

Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The International Molders and Allied Workers Union, AFL-CIO-CLC, and Local 100 of the International Molders and Allied Workers Union, AFL-CIO-CLC, hereby

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[1] In addition to the parties listed in the caption, the following were also plaintiff-intervenors in the district court and appellants in the court of appeals: Willie L. McCoy, Jimmie L. Rodgers, Harold Wood, Franklin Wood, James Knox, Fayte Jones, Robert Mathews, Jr., Willie McGinnis, James H. Patterson, J. G. Robinson, Mack Fritz, Wilbert Hogan, Charles Judkins, Louis J. Moore, Joe L. Steele, James Croom, Johnnie Tolbert, Adolph Hillary, III, Robert G. Harris, Richard S. Barnes, Arthur Berry, Wilbur Wilson, Jr., Jonathan Jones, Willie A. Neeley, Larry Ware, and Larry Robinson. The following were also plaintiff-intervenors in the district court: Wallace H. Warren, Robert Gray, Jr., James P. Perkins, Samuel L. Ramsey, and Mack Greathouse. Clow Corporation was also named as a defendant in the district court, but entered into a settlement with the plaintiffs prior to trial.

petition for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Howard, et al. v. International Molders and Allied Workers Union, AFL-CIO-CLC, et al.*, C.A. No. 85-7008, entered on January 14, 1986.

OPINIONS BELOW

The district court's findings of fact and conclusions of law are unreported; they are reprinted in the Appendix to this petition as Appendix B (16a-60a). The subsequent opinion of the district court on issuing final judgment is likewise unreported and is reprinted as Appendix E (76a-77a); an amendment to that opinion is reprinted as Appendix G (79a).

The opinion of the court of appeals is reported at 779 F.2d 1546 and is reprinted as Appendix A (1a-15a).

JURISDICTION

The court of appeals entered judgment on January 14, 1986. A timely petition for rehearing was denied on February 18, 1986. Appendix H (80a-81a). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(c) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(c), provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities,

> or would limit such employment or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

On September 13, 1977, respondents commenced this employment discrimination lawsuit on behalf of all black employees at the Tarrant City, Alabama, plant of Clow Corporation. Named as defendants were Clow; petitioner Local 100 of the International Molders and Allied Workers Union; and petitioner International Molders and Allied Workers Union, the local union's parent organization. (The local and international are referred to herein collectively as "the union.") The union was the exclusive bargaining representative of the hourly employees at Clow's Tarrant City plant.

Plaintiff's complaint alleged that Clow had committed various unlawful employment practices, including that "the defendant company used unvalidated tests which have a disparate impact on blacks and cannot be justified by business necessity." The complaint alleged that the union had not "made any effort to attempt to correct or

modify the policy or practice of racial discrimination heretofore alleged."

The facts pertinent to the question presented in this petition—as established by the undisputed evidence and the findings of the district court which were affirmed by the court of appeals—are as follows.

Labor-management relations at Clow followed the normal pattern for an industrial workplace. Clow had complete control over all hirings, promotions, terminations, and other employment decisions, except to the extent that Clow agreed in collective bargaining with the union to follow particular rules or practices. The union could attempt to change the employer's practices by negotiating new contract provisions or by filing grievances to allege that some practice violated an existing contract provision.

The workforce at Clow, and the local union's membership, were approximately 50 percent black and 50 percent white. Black members were very active in the local union's affairs, and were regularly elected as officers. The union processed grievances for both black and white employees in approximately equal numbers and pursued grievances as aggressively for black employees as for whites.

Prior to the start of each round of negotiations, the local union held a special meeting to formulate the union's bargaining demands. That meeting was, of course, equally open to black and white members, and "[t]here is no evidence . . . of intimidation or coercion practiced against black employees or that the union was dominated by a hostile white majority." App. 46a. To the contrary, the "important local union committees," including the negotiating committee and the grievance committee, were composed of approximately equal numbers of blacks and whites at all relevant times. *Id.*

Prior to the filing of this lawsuit, Clow administered a standardized test, known as the Bennett Mechanical Comprehension Test (hereinafter "the test"), to employees who sought promotions or transfers into some of the jobs in the plant. The district court found that the test had a disparate impact on black employees and that the test had not been proven to be job-related.

The collective bargaining agreement between Clow and the union was silent on the subject of testing; the union had not agreed to Clow's use of the test, nor had the union obtained any contractual provision that expressly limited testing by Clow.

During the limitations period—from May 1975 to June 1980—union representatives protested to Clow on at least one occasion about Clow's testing.[2] But no union member ever asked the union to make testing a subject of collective bargaining, and the union never demanded during contract negotiations that the company cease using the test. The district court found that this omission was *not* the result of an attempt by the union to "alter[] the bargaining strategy to the detriment of black employees," or of "excluding blacks from participation in the internal affairs of the union or the collective bargaining process, or of failing to heed black suggestions for changes in the labor contracts." App. 44a. That court added: "The court cannot equate failure to achieve in collective bargaining with failure to achieve because of racial animosity." *Id.*

The district court nonetheless held the union liable for Clow's testing. That court held that with respect "to a labor organization's conduct that is challenged under [§ 703(c)(3) of Title VII,] 42 U.S.C. § 2000e-2(c)(3)" —which makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against

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[2] The union had made a like protest in 1970, prior to the start of the limitations period. The limitations period ended in June 1980 because Clow closed the Tarrant City plant at that time.

an individual in violation of [Title VII]"—the applicable legal standard is whether the union has "tak[en] every reasonable step to ensure that the employer complie[d] with Title VII." App. 57a-58a & n.17. The district court found that the union here had failed to " 'prove[] to the full satisfaction of the courts' " that it had done so. App. 51a, *quoting from Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1129 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982). That court concluded further that "conduct which violates the section [§ 703(c)(3)] constitutes intentional discrimination," and that therefore the union's failure to negotiate for elimination of the test also violated 42 U.S.C. § 1981. App. 58a & n.19.

After entering these findings of liability, the district court referred the case to a special master to determine the amount of backpay or damages that should be awarded against the union. The special master found that the class of plaintiffs had suffered no monetary loss as a result of Clow's use of the test in question and that therefore damages should not be awarded.[3] The district court accepted the report of the special master and entered final judgment in favor of the union. App. 78a. In an accompanying opinion, that court observed that its earlier liability ruling under § 1981—that the union's failure to take "every reasonable step" to eliminate the test constituted intentional discrimination prohibited by 42 U.S.C. § 1981—was "likely incorrect," and that "[t]he court did not and does not make the finding that there was other-

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[3] The master based this determination on his finding that, despite the test, during the limitations period black employees at Clow had filled more than half of the vacancies in jobs for which the test was required. The court of appeals held that under this Court's decision in *Connecticut v. Teal*, 457 U.S. 450 (1982), this was a legally insufficient basis for denying backpay. App. 10a-14a. Petitioners do not seek review of that ruling here.

wise direct or circumstantial proof of intentional discrimination." App. 76a & n.1.[4]

The plaintiffs appealed to the Court of Appeals for the Eleventh Circuit, challenging the district court's refusal to award any backpay. The union cross-appealed, contending that the district court had erred in finding union liability based solely on the union's failure to press for elimination of the employer's test. The court of appeals ruled that the union was properly found liable because it "did not use all reasonable effort to cause the employer to put an end to the use of the non-validated tests for promotion." App. 14a. The court of appeals also reversed the district court's denial of relief to the plaintiff class, and remanded the case to the district court for identification of the individuals who had been injured and for determination of the amount of backpay or damages.

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[4] Because of the statement quoted in text, petitioners do not believe that the district court ultimately found union liability under 42 U.S.C. § 1981. The court of appeals did not expressly rule on the § 1981 claim. App. 9a-10a. On the off chance, however, that the decision below could be deemed to be based on § 1981 as well as Title VII, we have framed the Question Presented to include both statutory provisions. If the decision below were premised on § 1981 as well as Title VII, the ruling under § 1981 would merit this Court's review on certiorari for all the reasons set forth in this petition, and also for the reason that such a ruling would conflict with this Court's decision in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), in which the Court held that § 1981 prohibits only intentional discrimination and does not "impose an affirmative obligation to ensure that blacks enjoy [the] right" to be free from discrimination, nor does it make defendants "guarantors of workers' rights as against third parties who would infringe them." *Id.* at 396.

If certiorari is granted, petitioners will show that under *General Building Contractors*, § 1981 cannot furnish an alternative ground for reaching the same result as was reached below under Title VII.

REASONS FOR GRANTING THE PETITION

The decision below imposes on labor unions an extraordinary duty: the duty to make all reasonable efforts to prevent another, independent entity over which the union has no control—an employer—from violating the law. The appellate court found that duty in § 703(c)(3) of Title VII of the Civil Rights Act of 1964, even though that section, in terms, provides only that a union shall not "*cause or attempt to cause*" an employer to discriminate. And the appellate court held that unless a union discharges its duty to prevent employer discrimination, the union is liable for the employer's wrongs, even though, as this Court has said in a related context, statutory words such as these "cannot be easily read to impose liability vicariously." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 692 (1978).[5]

The decision below merits plenary consideration by this Court for two reasons.

First, the decision's strained and unlikely reading of § 703(c)(3) conflicts with a decision of the Seventh Circuit holding that union liability may *not* be premised on a union's mere failure to make affirmative efforts to prevent employer discrimination. The need to resolve this conflict is sharpened by the fact that the decisions of the lower federal courts are in general disarray over the questions whether a union may be held liable for failing to prevent an employer from violating Title VII and, if so, in what circumstances that liability attaches.

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[5] The lower court's construction of § 703(c)(3) is even more unlikely when it is recalled that the language of § 703(c)(3) was taken *in haec verba* from § 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(2), and that the latter section has never been understood to impose a like obligation on unions to prevent employers from discriminating within the meaning of the NLRA. *See, e.g., Glasser v. NLRB*, 395 F.2d 401, 406 (2d Cir. 1968); *NLRB v. Jarka Corp.*, 198 F.2d 618, 621 (3d Cir. 1952).

Second, the decision below is fundamentally at odds with the national labor policy. The only way unions differ from anyone else with regard to what employers do is that unions engage in collective bargaining with employers as provided for in the federal labor laws. Under the decision below, unions are required to attach the highest priority, in bargaining, to remedying employer discrimination. Yet the entire theory of the national labor policy is that federal law should not dictate substantive bargaining priorities or results, but should leave the parties to arrive at their own bargaining agendas and their own agreements. And the very point of Title VII, as of other employee-protective legislation, is to confer substantive rights on workers directly—rights that exist *independently of any collective bargaining agreement* and that are *independently enforceable by each worker* without intervention by his or her bargaining representative. The decision below thus imposes on unions a duty that is not part of Title VII's statutory scheme and that threatens fundamentally to undermine the national labor policy of free collective bargaining.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

There is no doubt that, under Title VII, a union that engages in discriminatory conduct commits an unlawful employment practice. Such union liability is explicit in the statute, in §§ 703(c)(1) and (c)(2), which parallel the language of §§ 703(a)(1) and (a)(2), the sections which define unlawful employment practices by employers. Nor is there any doubt that a union is liable when it induces an employer to discriminate, or even attempts to do so. That ground for liability is also explicit in the statute, in § 703(c)(3). The disputed question is whether under § 703(c)(3) a union is guilty of "caus[ing] or attempt[ing] to cause" an employer to discriminate simply because the union fails to make affirmative efforts to keep an employer from discriminating.

The lower federal courts have struggled with this question for over fifteen years, without guidance from this Court.[6] A number of the courts have held, like the court below, that unions have an affirmative duty to combat employer discrimination.[7] But in *Williams v.*

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[6] The only employment-discrimination case in this Court which even remotely touches on the question presented herein is *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976). In *McDonald*, the primary issue was whether discrimination by an employer against white employees in meting out discipline violates Title VII. There was a secondary issue of union liability in *McDonald* based on allegations in the complaint that the union had "acquiesced and/or joined in" the company's alleged racial discrimination by negotiating a lighter penalty for a black employee than for white employees charged with the same misconduct. *Id.* at 284. The lower courts dismissed the complaint as to all defendants, holding that employees who admit having committed a crime against their employer cannot invoke the protection of Title VII. *Id.* at 278. This Court reversed and reinstated the complaint. *Id.* at 283. On the issue of union liability, the Court explained its holding as follows:

> The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them. [*Id.* at 285.]

As the quoted sentence demonstrates, the Court understood the complaint in *McDonald* to allege that the union had "take[n] [race] into account" in negotiating a compromise that favored a black employee over the whites. Such an action would constitute intentional discrimination by the union, not failure to oppose employer discrimination. Nonetheless, some lower courts have construed *McDonald* to support the theory that unions are liable simply because they fail to make affirmative efforts to stop an employer from discriminating. *E.g., Goodman v. Lukens Steel Co.*, 777 F.2d 113, 126-27 (3d Cir. 1985).

[7] *E.g., Goodman v. Lukens Steel Co.*, 777 F.2d 113, 126-27 (3d Cir. 1985); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *Macklin v. Spector Motor Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (1973); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 282 (N.D. Ind. 1977); *Dickerson v. U.S. Steel Corp.*, 439 F. Supp.

General Foods Corp., 492 F.2d 399 (7th Cir. 1974), the Seventh Circuit reached the opposite conclusion. In *Williams*, the plaintiffs sued the employer for maintaining a sexually discriminatory policy in regard to overtime. The *Williams* plaintiffs sued the union as well, alleging that the union "failed to protect the female members of the Company from said discriminatory policies and practices." 492 F.2d at 405. The court of appeals affirmed dismissal of the complaint against the unions, declaring: "*Mere failure by the Unions to protect female employees from discriminatory Corporation policies . . . is insufficient to establish liability.*" *Id.* (emphasis added).[8]

Although the *Williams* decision was based on a claimed breach of the union's duty of fair representation and the

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55, 62-63 (E.D. Pa. 1977); *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642, 667, 673-75 (M.D.N.C. 1974), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975); *United States v. Bethlehem Steel Corp.*, 312 F. Supp. 977, 988-91 (W.D.N.Y. 1970), *modified on other grounds*, 446 F.2d 652 (2d Cir. 1971).

In addition to these cases that have held that unions are liable for failure to take action against an employer's discriminatory practices, other Circuits have articulated this same theory of union liability in cases that involved direct union participation in the alleged discrimination, *viz*, negotiating an unlawful contract provision. *E.g., Terrell v. United States Pipe & Foundry Co., supra*, 644 F.2d at 1120-21; *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976). *See also Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-11 (10th Cir. 1980).

[8] A number of district courts have reached the same conclusion in Title VII actions. *E.g., Ivey v. Western Electric Co.*, 23 F.E.P. 1012 (N.D. Ga. 1977); *Mills v. Fox*, 421 F. Supp. 519 (E.D.N.Y. 1976); *Ruckel v. Essex International, Inc.*, 14 F.E.P. 403 (N.D. Ind. 1976); *Meadows v. Ford Motor Co.*, 6 F.E.P. 795 (W.D. Ky. 1973); *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968). *See also Golden v. International Ass'n of Firefighters Local 55*, 633 F.2d 817, 820-21 (9th Cir. 1980).

instant case involves the union's duty under § 703(c)(3) of Title VII, the two cases cannot be reconciled.[9] The plaintiffs' complaint in the instant case alleged only a fair representation violation by the union. The lower courts based their decision on § 703(c)(3) of Title VII because they understood that section to be coextensive with the duty of fair representation. Those courts thus found a Title VII violation by expressly applying the "standard . . . measuring the duty of the Union *under its obligation of fair representation.*" App. 2a (appellate court decision characterizing district court opinion) (emphasis added).

This reliance on what the court below perceived to be fair-representation principles accords with other decisions construing Title VII to impose on unions affirmative obligations to oppose employer discrimination. Beginning with Judge Skelly Wright's seminal decision in *Macklin v. Spector Motor Freight*, *supra*, 478 F.2d at 989, those cases have assumed that the duty of fair representation obligates a union "to negotiate actively for nondiscriminatory treatment in aid of its black members" and have held that Title VII must be deemed to incorporate the same duty.[10] Thus there is an unmistakable conflict among the circuits as to whether federal law requires unions to prevent employer discrimination.[11]

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[9] The *Williams* plaintiffs had alleged a Title VII count in their complaint but that count was dismissed for failure to name the unions in any EEOC charge. 492 F.2d at 405.

[10] See also cases cited in note 7, *supra*.

[11] That conflict is heightened—and the confusion in the lower courts intensified—by the Sixth Circuit's decision in *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974). That case involved a no-transfer rule which the employer enforced during the six-year limitations period in that case, from 1966-1972. The rule, which was neither contained in nor prohibited by the applicable collective bargaining agreements, prevented black employees from transferring into the all-white classification of over-the-road driver. No black employee ever requested that the

II. THE DECISION BELOW IS FUNDAMENTALLY AT ODDS WITH THE NATIONAL LABOR POLICY.

There is a second reason why the issue presented in this case merits plenary review by this Court: the decision below is fundamentally at odds with the national labor policy.

The starting point for analysis is the recognition that employers and unions are separate and autonomous en-

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union attempt to bargain away the rule, and the only action the union took in opposition to the rule was that in 1967, a year or more after the limitations period began, the union made one proposal in bargaining to eliminate the no-transfer rule. The court held that the union could not be held liable for the employer's maintenance of the no-transfer rule "when all the proof shows [is] that [the union] had knowledge of the employer's alleged discrimination, and that it did not initiate any action to stop it until 1967." *Id.* at 426.

In subsequent decisions, without recognizing the apparent conflict with *Thornton*, the Sixth Circuit has expressly embraced the theory that a union has an affirr ıtive duty under Title VII to attempt to eliminate employee discrimination. *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1104-05 (6th Cir. 1981); *Smith v. South Central Bell Telephone Co.*, 518 F.2d 68, 70-71 (6th Cir. 1975); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977). In light of these subsequent Sixth Circuit cases, it may be that *Thornton* is best read as holding either (1) that a union's duty under § 703(c)(3) to challenge employer discrimination arises only when it is requested to do so by an affected employee, or (2) that so long as a union makes some *bona fide* effort to combat employer discrimination, the union discharges its (supposed) affirmative duty under § 703(c)(3), even if the union has not taken "every reasonable step" to stop the discrimination. (At least one other court has held that only *bona fide* efforts are required to discharge this duty. *Green v. U.S. Steel Corp.*, 481 F. Supp. 295, 313-14 (E.D. Pa. 1979); *Dickerson v. U.S. Steel Corp.*, 439 F. Supp. 55, 83 (E.D. Pa. 1977).)

On either of these readings, the decision below is in conflict with *Thornton*, as the decision below requires a union to act without request to do so and obligates a union to make "*every* reasonable effort" to combat employer discrimination. Plainly, under the rule adopted by the court below, the union in *Thornton* would *not* have been exonerated from liability.

tities—entities which " 'proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.' " *General Building Contractors Ass'n v. Pennsylvania, supra*, 458 U.S. at 394. Moreover, in the "absen[ce of] a collective bargaining agreement," under our labor system "[m]anagement hires and fires, pays and promotes, supervises and plans. All these are part of its function, and . . . may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). A union has the ability to affect management's conduct in running the business only to the extent that the union is able to secure collectively-bargained limitations on these managerial powers.

Given these realities, the holding below requiring unions to make "every reasonable effort" to prevent employer discrimination means, as a practical matter, that unions must do everything reasonably within their power in collective bargaining to secure contractual provisions proscribing employment practices that adversely affect minority employees. That holding directly intrudes on the collective bargaining process. And such intrusion is inimical to the national labor policy.

"The goal of federal labor policy . . . is . . . to encourage the employer and the representatives of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). That goal is "served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Id.* The parties thus determine their own bargaining agendas and their own priorities and make their own compromises and agreements. "[G]overnment may not step in and become party to the negotiations," *Golden State Transit Co. v. Los Angeles*, —— U.S. ——, No. 84-1644, Slip op. at 11 (April 1, 1986), because

Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences," *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960).[12] Indeed, "the fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract," *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

The duty of fair representation has been carefully crafted to reflect these principles. That duty has been built on the premise that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as "union discretion is essential to the proper functioning of the collective bargaining system," *Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979). The duty recognizes that it is the union's function to "balanc[e] individual and collective interests" so as to develop proposals and strategies that produce "increased benefits for workers in the bargaining unit as a whole." *Barrentine v. Arkanses-Best Freight System*, 450 U.S. 728, 742 (1981). Thus, so long as a union arrives at its bargaining positions "honestly, in good faith, and without hostility or arbitrary discrimination," the duty of fair representation is not offended regardless of the *substance* of the union's positions, even where the

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[12] In *Insurance Agents*, the Court held that the National Labor Relations Board is not free to proscribe the use of certain economic weapons because by doing so the Board "would be in a position to exercise considerable influence upon the substantive terms on which the parties contract" which would "amount[] to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 361 U.S. at 490, 498. The decision below much more clearly intrudes upon "the substantive aspects of the bargaining process" by requiring unions to make "every reasonable effort" to procure contractual provisions governing certain subjects.

union's position is "contrary to that of some individuals whom it represents" or "support[s] the position of one group of employees against that of another." *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964).

Precisely because this is so, when Congress has thought it necessary or appropriate for employees to enjoy particular protections regardless of their collective strength or their collective decisions or priorities, Congress has not compelled unions to bargain for that protection. Instead Congress has enacted statutes directly establishing the necessary affirmative protections—statutes like the FLSA,[13] OSHA,[14] ERISA,[15] and Title VII. And in these instances Congress has *not* imposed on unions the duty to enforce these statutory provisions, but has created governmental authorities and/or private causes of action (often with fee awards to prevailing plaintiffs) to do the enforcement job. These statutes thus create "federal minimal employment standards" which are " 'independent of the collective bargaining process' " and that " 'devolve on [employees] as individual workers and not as members of a collective organization.' " *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 53 L.W. 4616, 4624 (June 3, 1985).[16]

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[13] The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

[14] The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*

[15] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*

[16] Because these rights "devolve on employees as individual workers and not as members of a collective organization," it is no part of a union's duty of fair representation to enforce these statutory rights. "[T]he duty of fair representation . . . is coextensive with [the union's] statutory authority to act as the exclusive representative for all employees within the unit." *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984). The duty does *not* extend to those areas in which the individual employee is entirely free to protect his own interests, incuding the enforcement of individual statutory rights.

The decision below thus turns the national labor policy entirely on its head. Unlike the duty of fair representation, the decision below delves deeply into the bargaining process by imposing on each union an affirmative duty to make "every reasonable effort" to obtain anti-discrimination contractual provisions. Because such "contractual rights and remedies against discrimination"—like any other contractual right that a union secures—"must result from other concessions already made by the union as part of the economic bargain struck with the employer," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), the duty the court below has read into Title VII effectively fixes bargaining priorities for unions. Under the decision below unions are compelled to subordinate other bargaining aims to the goal of securing contractual provisions that duplicate the protections already conferred by Title VII. This is true regardless of the other pressing problems that the represented group of employees may face—problems as to which there usually is no statutory protection and as to which the employees are wholly dependent upon whatever contractual rights they can obtain by dint of their collective strength. Furthermore, the duty created by the court below exists even where no employee has requested the union to expend its bargaining power on securing contractual provisions that parallel the provisions of Title VII. And the duty exists regardless of the union's bargaining strength or lack thereof.[17]

Imposing such a duty on a union and holding the union liable for an employer's wrongs unless a court finds that the union advanced all of the demands it was required to advance, pressed those demands with sufficient vigor,

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[17] Requiring unions to bargain for contractual provisions paralleling Title VII's prohibitions on employment discrimination seems particularly inappropriate given this Court's determination that "[a]rbitral procedures"—through which such contractual provisions would be enforced—provide a "comparatively inappropriate forum for the final resolution of rights created by Title VII." *Alexander v. Gardner-Denver, supra,* 415 U.S. at 56.

and made only "reasonable" compromises, can only destabilize collective-bargaining relationships and interfere with the parties' ability to reach agreements reflecting their needs and desires without resort to economic warfare. Such a requirement thus will defeat the overall aim of the national labor policy: enabling employers and employees "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver, supra,* 358 U.S. at 295.[18]

This Court previously has held that the congressional policy of eliminating discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Emporium Capwell Co. v. Western Addition Community Org.,* 420 U.S. 50, 69 (1975). *See also TWA v. Hardison,* 432 U.S. 63, 79 (1977). And this is the last case in which the national labor policy should be deemed to have been compromised by the enactment of Title VII. For Congress enacted Title VII for the very purpose of creating rights that would be independent of "majoritarian processes"; indeed, Title VII rights "can form no part of the collective bargaining process," because to make Title VII rights dependent upon the outcome of collective bargaining "would defeat the paramount congressional purpose behind Title VII." *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 51. Title VII thus confers on each

---

[1] The extent to which the lower courts have gone in policing a union's efforts to combat employment discrimination, under the theory of union liability embraced by the court below, is indicated by the decision in *Goodman v. Lukens Steel Co.,* 580 F.Supp. 1114, 1159 (E.D. Pa. 1984), *aff'd,* 777 F.2d 113 (3rd Cir. 1985). In that case a union was held liable for an employer's use of tests notwithstanding the fact that the union had consistently "object[ed] to [the employer's] use of tests of all kinds" and had sought the elimination of the tests on the ground that they were not job-related. To the court, the union had failed to meet its affirmative duty under § 703(c)(3) because the union had not expressly argued to the employer that the tests had a racially disparate impact.

employee, as an individual, an indefeasible right to be free from employment discrimination. And Title VII both establishes a procedure by which any employee may enforce that statutory right and also creates a public agency, the Equal Employment Opportunity Commission, which "is empowered . . . to prevent any person from engaging in any unlawful employment practice," 42 U.S.C. § 2000e-5(a).

It is thus apparent that Congress did not commission labor unions, which are *majoritarian* organizations, to serve as Congress' agent in enforcing the *individual* rights created by Title VII. It follows that nothing in Title VII justifies impairing the national policy of free collective bargaining, which is precisely what the decision below does. To safeguard the national labor policy—and to resolve the conflict among the circuits—the Court issue a writ of ceritorari.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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85-1629

No. ———

Supreme Court, U.S.
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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO, AND LOCAL 100 OF THE INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO-CLC,
Petitioners,

v.

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated, and WILLIE L. MCCOY, JIMMIE L. RODGERS, HAROLD WOOD, FRANKLIN WOOD, JAMES KNOX, FAYTE JONES, ROBERT MATHEWS, JR., WILLIE MCGINNIS, JAMES H. PATTERSON, J. G. ROBINSON, MACK FRITZ, WILBERT HOGAN, CHARLES JUDKINS, LOUIS J. MOORE, JOE L. STEELE, JAMES CROOM, JOHNNIE TOLBERT, ADOLPH HILLARY, III, ROBERT G. HARRIS, RICHARD S. BARNES, ARTHUR BERRY, WILBUR WILSON, JR., JONATHAN JONES, WILLIE A. NEELEY, LARRY WARE, and LARRY ROBINSON,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-7008

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,
Cross-Appellees,

WILLIE L. MCCOY, *et al.*,
Intervening Plaintiffs-Appellants,
Cross-Appellees,

v.

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO-CLC, LOCAL #100 OF THE INTERNATIONAL MOLDERS and ALLIED WORKERS UNION, AFL-CIO-CLC,
Defendants-Appellees,
Cross-Appellants.

Jan. 14, 1986

Appeals from the United States District Court
for the Northern District of Alabama

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an appeal from a judgment dismissing a complaint filed by a class of employees against the Clow

Corporation and defendant Union on charges of racial discrimination in employment practices.

I. STATEMENT OF THE CASE

Early in the proceedings, a consent decree was entered between the Clow Corporation, the employer, and the class of plaintiffs. However, the suit continued as against the labor organization under the provisions of 42 U.S.C. § 2000e-2(c)(3).[1] Plaintiffs also proceeded under the provisions of 42 U.S.C. § 1981.

At the trial, plaintiffs laid great stress upon the discriminatory effect on blacks of the departmental system under which most blacks were employed in the lowest paying department and under which there was only departmental seniority for promotion. They also stressed the fact that as to certain jobs, an unvalidated test was required by the employer and that the labor organization failed adequately to oppose the unvalidated testing requirement.

The trial court held that the seniority policy of the employer was carried out in good faith and held that plaintiffs had failed to establish any discriminatory practice thereabouts. With respect to the unvalidated testing, however, the court adopted what it called the *"Terrell"* standard as measuring the duty of the Union under its obligation of fair representation. This standard was established in *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120 (5th Cir., Unit B, 1981):

> We begin with established principles of law, Section 703(c)(3) of Title VII makes it unlawful for

---

[1] Section 42 U.S.C. 2000e-2(c)(3) provides:

> It shall be an unlawful employment practice for a labor organization . . .
>
> (3) To cause or attempt to cause an employer to discriminate against an individual in violation of this section.

> a union to "cause or attempt to cause an employer to discriminate." . . . 42 U.S.C. § 2000e-2(c)(3). We have recognized that under the Act: [l]abor organizations, as well as employers, have an affirmative duty to take corrective steps to prevent the perpetuation of past discrimination. *Myers v. Gilman Paper Co.*, 544 F.2d 837, 850 (5th Cir.), *modified in other respects on rehearing*, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed. 2d 59 (1977). (citation omitted).

Recognizing the effect of the *Terrell* decision, the trial court made the following findings of fact and conclusions of law:

> Plaintiffs allege that defendants violated 42 U.S.C. § 2000e-2(e)(3) ad 42 U.S.C. § 1981 by acquiescing in the administration by the employer of facially neutral tests that had an adverse impact on plaintiffs. To prevail on this claim, plaintiffs must establish first that the mechanical comprehension test used by the company violated Title VII, and second, that defendants failed to comply with the *Terrell* "every reasonable step" standard.[17]
>
> The Supreme Court ruled in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 [91 S.Ct. 849, 853, 28 L.Ed. 2d 158] (1971), that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." A plaintiff makes out a prima facie

---

[17] Although the Fifth Circuit in *Terrell* and *Walker* applied this standard to situations involving seniority systems, this court assumes that the Fifth Circuit would always apply this standard to a labor organization's conduct that is challenged under 42 U.S.C. § 2000e-2(c)(3).

case of discrimination by showing "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 [95 S.Ct. 2362, 2375, 45 L.Ed.2d 280] (1975). The employer then has the burden to establish that the test is job related. *Id.*

Clow Corporation used the mechanical comprehension test as a condition to promotion from 1965 (the effective date of Title VII) until 1977 (when this suit was filed). During those years, 56% (103 of 184) of the white employees who took the test passed it; only 12.5% (10 of 80) of the black employees who took the test passed it. The court concludes that plaintiffs established their prima facie case of disparate impact discrimination. Defendants did not rebut this presumption with any proof that the test was job related. Accordingly, the court concludes that plaintiffs established that the company's mechanical comprehension test, although neutral in form, had a discriminatory impact and violated Title VII.

Next the court must determine whether the union defendants satisfied the *Terrell* standard. Union representative Robert Hollman criticized the company's use of the test on January 19, 1970. White members of the union committee demanded that the company cease using the tests on August 11, 1975. The court has pointed out that the union members never demanded that the union attempt to persuade the company to stop using the tests through the grievance procedure in 1970. There was no evidence that the union committee ever demanded during the 1972, 1974, or 1977 negotiations that the company cease using the tests. Defendants did not establish that the company would have refused to stop using the

tests.[18] The company's abandonment of the tests when this suit was filed illustrates that the company would have considered agreeing to halt the use of the tests. Accordingly, the court concludes that the local union violated 42 U.S.C. § 2000e-2(c)(3) because it did not satisfy the *Terrell* standard of taking every reasonable step to ensure that the employer complies with Title VII. Additionally, the court concludes that the local union violated 42 U.S.C. § 1981 because its conduct evidenced an intent to discriminate.[19]

An international union can be held liable for a discriminatory practice if it has a "sufficient connection" with the discriminatory practice. *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 851 (5th Cir.), *cert. dismissed*, 434 U.S. 801 [98 S.Ct. 28, 54 L.Ed.2d 59] (1977). The Fifth Circuit in *Myers* adopted the holding of the Fourth Circuit in *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270-71 (4th Cir.), *cert. denied*, 429 U.S. 920 [97 S.Ct. 314, 50 L.Ed.2d 286] (1976): "The Fourth Circuit recently held that a sufficient connection exists where, as here, the international union provided 'an advisor' to the local in its negotiations and the international approved the resultant collective bargaining agreement." *Myers v. Gilman Paper Corp.*, 544 F.2d at 852. The court has found above that Hildridge Dockery, the International Molders representative for the Local Union,

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[18] This situation is to be compared to the seniority system situation: there this court found that "the company had no intention of making any further concessions regarding the seniority system." *See* p. 36 *supra*.

[19] Labor organizations violate 42 U.S.C. § 2000e-2(c)(3) if they "*cause* or *attempt to cause* an employer to discriminate . . . ." (emphasis added). The court is of the opinion that this language indicates that conduct which violates the section (2000e-2(c)(3)) constitutes intentional discrimination.

worked closely with the bargaining committee for an advisor from 1972 until 1980. The court concludes that Dockery's activities provide a sufficient connection of the International to the Local Union's violation of Title VII and § 1981. Accordingly, pursuant to *Myers v. Gilman Paper Corp.*, the court concludes that the International also violated 42 U.S.C. § 2000e-2)c)(3) and 42 U.S.C. § 1981 for its conduct regarding the company's mechanical comprehension test.

Thereafter, on the 21st day of June, 1983, the court entered the following order:

In conformity with the findings of fact and conclusions of law entered herein on June 1, 1983, the court finds in favor of the plaintiffs and against the defendants for their violation of 42 U.S.C. § 2000e-2-(c)(3) and 42 U.S.C. § 1981, for its conduct regarding the use of the mechanical comprehension test. The court denies all other claims made by the plaintiffs.

Within forty-five (45) days from the date of this order is entered, the parties will attempt to arrive at an amount of monetary remedy for the plaintiffs to compensate them for the defendants' discriminatory conduct with respect to the mechanical comprehension test. If the parties are unable to arrive, in good faith, at a monetary remedy, then the court will enter such further orders or decrees as are necessary to enable the parties to produce for the court their own procedures and formulas for the calculation of the monetary remedy due the plaintiffs. The court notes that the parties may reach such an accord as to amounts, etc., while reserving the right to appeal or seek other post-trial relief.[1]

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[1] The court has considered the objection of defendants to plaintiffs' proposed judgment and considers them most appropriate for post-judgment consideration.

The court then submitted to the magistrate acting as special master, the task of determining the damages that would be due to the class based upon the court's order. The special master, finding that 52 percent of the vacancies that occurred during the statutory period had been filled by blacks, and only 48 percent by whites, decided that there was no justification for the award of any damages to the plaintiff class. The finding and conclusion to this effect follows:

> In conclusion, the magistrate finds that 25 vacancies requiring passage of the test existed during the time in question. Of the total employees tested during the pertinent time period, 35.6% (or, using the figures of plaintiff's counsel, 39.5%) were black. Of the 25 job vacancies, 52% of them were filled by black employee bidders.
>
> *Conclusion of Law*
>
> Applying the assumptions specified by the Court to the above findings, black employees filled job vacancies to a *greater* extent than the proportion of black employees who were tested. If it is assumed that black employees should have passed the tests and subsequently filled the vacancies in proportion to the number of black employees who took the tests, then only 35.6% (or 39.5%, using plaintiffs' figures) of the black employees should have filled the vacancies. In fact, black employees filled the vacancies to the extent of 52%.
>
> Finding that black employees filled vacancies to a greater extent than the proportion of black employees who were tested, the magistrate concludes that, applying the formula specified by the Court, the subclass of plaintiffs is not entitled to any back pay and that no damages should be required to be paid by the defendants.

By order of November 29, 1984, the trial court adopted the special master's report by the following order: [2]

> This cause came on to be heard after the court had referred this action to a Magistrate as Special Master for a hearing with regard to damages after the court had found the defendant unions liable under Title VII for failing to take every reasonable step to insure that the employer complied with Title VII by abandoning the tests which had a discriminatory impact on black employees.[1]

---

[1] This court was likely incorrect stating that same failure resulted in a finding of intentional discrimination under 42 U.S.C. § 1981. The court did not and does not make the finding that there was otherwise direct or circumstantial proof of intentional discrimination.

> The plaintiffs have objected to the report of the Special Master and the court has conducted a hearing thereon. The court finds and concludes that the report of the Special Master is factually accurate and the court accepts and adopts the same.[2]

---

[2] The court, in effect, replicates the Magistrate's findings.

> The court, *sua sponte*, asked the parties to address whether *Connecticut v. Teal*, 457 U.S. 450 [440, 102 S.Ct. 2525, 73 L.Ed.2d 130] (1982) had application to the case. After receiving briefs from the parties, the court has determined that it does not. The court had already determined that the defendant unions were *liable*. The remaining issue was whether the class had suffered damages during the designated period. The court followed the procedures specified in *United States v. U.S. Steel*, 520 F.2d 1043 (5th Cir.1975) and *Pettway v. ACIPCO*, 681 F.2d 1249 [1259] (11th Cir.1982). This procedure resulted in

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[2] It is necessary to quote the several orders of the trial court, because in at least two of them, earlier orders are modified.

> a determination that the class suffered no injury or damages for the designated period. The plaintiffs have not proved, for the appropriate period, an actual wage loss as the result of discrimination. The class not having suffered any injury as the result of the failure of the unions to take action, the plaintiffs are not entitled to recovery of back pay from these defendants.

On December 3, 1984, the court filed the following memorandum opinion.

> A court hereby amends it Memorandum Opinion filed on November 29, 1984 to add the following sentence.
>
> It may well be that, since there is no indication of any disparate impact, during the relevant period, the court should conclude that not only have plaintiffs failed to prove any damages for the relevant period, but that the court's finding and conclusion of liability should be vacated. The court also cites *Ingram v. Madison Square Garden*, 709 F.2d 807 (2nd Cir.1983).

A timely appeal was filed by the plaintiffs from the final judgment of November 29. A cross-appeal was filed by the unions from the determination by the trial court that they were "liable" to the plaintiffs. By doing so, they apparently did not consider the December 3 order as having withdrawn the trial court's earlier judgment. Because of the ambiguous manner in which the court dealt with this matter—"it *may be* that the court's finding and conclusion of liability *should be vacated*," we cannot determine whether the finding of liability was actually withdrawn. The defendant-cross-appellant unions appeal from this finding, so they apparently assume that it still represents the judgment of the trial court. Since we conclude that the plaintiffs had established liability without regard to the finding of no damages, we need not resolve this

issue. The plaintiffs filed a motion for an interim award of attorney's fees which the trial court denied under the following order on January 4, 1985: "Motion denied pending appeal. Leave granted to refile if judgment reversed."

II. ISSUES

The issues before this Court are:

1. Did the trial court err in finding that the defendant unions were not liable for the operation of the seniority system as it existed at Clow?
2. Did the district court correctly decide that the unions were liable to the plaintiff class on account of their failure adequately to insist on the elimination of the unvalidated testing?
3. Did the trial court err in finding that no damages were due to the plaintiff class because the "bottom line" showed that a disproportionately high number of class members were employed during the relevant statutory period in spite of the existence of the non-validated tests?
4. Did the trial court err in not granting interim attorney's fees?

III. DISCUSSION

The trial court requested the parties to brief the question whether *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) was applicable to the court's decision in this case. Following the filing of briefs, the court held, as noted above, that it was not applicable, because the court had already held the defendants *liable*. However, the court failed to consider that in its December 2, 1983 order, after it had decided that no damages were due, it stated that it had been wrong in finding liability. As we read *Teal*, however, it was expressly in a case in which the "bottom line", so-called, showed no

damages due to the class that the court's reasoning in *Teal* becomes important. In that case, four black plaintiffs were holding temporary positions of a supervisory nature. In order to obtain permanent appointments to these positions they were required, as was everyone else, to pass a written test which had not been validated. By the time the case came to trial, it was apparent that the State of Connecticut had actually promoted two of the plaintiffs which resulted in a "bottom line" reflecting that the members of the class had received the promotions they would have received if they had passed the test in a higher proportion than the percentage they bore to the percentage in the workforce. The Court, holding that Title VII was designed to guarantee to every minority person an equal "opportunity" for employment and promotion, said:

> Petitioners' examination, which barred promotion and had a discriminatory impact on black employees, clearly falls within the literal language of § 703(a)(2), as interpreted by *Griggs*. The statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*. A disparate-impact claim reflects the language of § 703(a)(2) and Congress' basic objectives in enacting that statute: "to achieve equality of employment *opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-430 [91 S.Ct. at 853] (emphasis added). When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment *opportunity* "because of . . . race, color, religion, sex, or national origin." In other words, § 703(a)(2) prohibits discriminatory "artifi-

> cial arbitrary, and unnecessary barriers to employment," 401 U.S. at 431 [91 S.Ct. at 853], that "limit . . . or classify . . . applicants for employment . . . in any way which would deprive or tend to deprive any individual of employment *opportunities*." (Emphasis added.)
>
> Relying on § 703(a)(2), *Griggs* explicitly focused on employment "practices, procedures, or tests," 401 U.S. at 430, [91 S.Ct. at 853], that deny equal employment "opportunity," *id.* at 431 [91 S.Ct. at 853]. We conclude that Title VII prohibits "procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups." *Id.* at 432 [91 S.Ct. at 854]. We found that Congress' primary purpose was the prophylactic one of achieving equality of employment "opportunities" and removing "barriers" to such equality. *Id.* at 429-430 [91 S.Ct. at 852-853]. See *Albemarle Paper Co. v. Moody*, 422 U.S. at 417 [95 S.Ct. at 2371]. The examination given to respondents in this case surely constituted such a practice and created such a barrier.

457 U.S. at 448, 102 S.Ct. at 2331 (footnote omitted.) (Emphasis in original.)

In the context of this case, it seems clear that this means that even though a slight majority of minority employees actually filled the vacancies after having passed the test, this did not ameliorate the condition of the remaining members of the class who failed to pass it and who should have had an "opportunity" to fill the vacancies without facing the headwinds of the unvalidated test.

The trial court called on the parties to submit proposed methods of determining the damages that should be awarded to the class in light of its determination that the defendants were liable to the plaintiffs on account of the unvalidated test. Although the petitioners submitted a

plan, the special master determined that it was not necessary to consider the potential damages to the non-successful members of the class, because of the "bottom line" success of the class as a whole. This, it seems clear under *Teal*, was error. Once the trial court found that the mechanical aptitude test had, during its entire period of operation, had a disparate impact on the minority class, it follows that it was the duty of the defendant unions under the *Terrell* standard to make every reasonable effort to see that these tests were brought to an end. This, the trial court found, they had failed to do. As we read *Teal*, every member of the class who failed to pass the test, was injured by the requirement that he do so before he could achieve the desired promotion. The special master should have made an effort to measure the damages suffered by such individuals. This he failed to do because he concluded that since the class as a whole had shown up better than expected in spite of the requirement that its members pass the unvalidated test, no damages were due the class for the injury they suffered.

So far as appears from the record before us, if the failure of the other members of the class had not prevented them from being considered for advancement, every one of the vacancies might have been filled by one of them. Any one of them might have had qualities of excellence that would have recommended them to their employer for filling one of the vacancies. Again, we quote from *Connecticut v. Teal*:

> In short, the District Court's dismissal of respondents' claim cannot be supported on the basis that respondents failed to establish a prima facie case of employment discrimination under the terms of § 703 (a) (2). The suggestions that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria.

> Title VII strives to achieve equality of opportunity by rooting out "artificial, arbitrary, and unnecessary" employer-created barriers to professional development that have a discriminary impact upon individuals. Therefore, respondents' rights under § 703(a)(2) have been violated, unless petitioners can demonstrate that the examination given was not an artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance in the role of Welfare Eligibility Supervisor.

Id. at 451, 102 S.Ct. at 2532 (emphasis in original.)

It is, therefore, clear that the unions in this case are liable, because they did not use all reasonable effort to cause the employer to put an end to the use of the non-validated tests for promotion.

Since the special master, and thus, the trial court, made no effort to determine whether damages could be proven with respect to the members of the class who had failed the test, the case will have to be remanded to the trial court for this determination. In the event that the plaintiffs are unable to make adequate proof of such damages, they would be entitled to nominal damages in any event:

> Nominal damages are presumed to follow from the violation of any valuable legal right, even if no actual damages are involved. *Basista v. Weir*, 340 F.2d 74, 87 (3rd Cir.1965); *Magnett v. Pelletier*, 360 F.Supp. 902, 907 (D.Mass.1973). "The term nominal damages means a trivial sum—usually one cent or one dollar—awarded to a plaintiff whose legal right has been technically violated but who has proved no real damage." *Chesapeake & Potomac Tel. Co. v. Clay*, 90 U.S.App. (D.C. 206), 194 F.2d 888, 890 (1952).

Tatum v. Morton, 386 F.Supp. 1308 (1974).

In the *Basista* case cited in the above quotation, the Court held as a matter of federal common law: "It is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation of a right to which the plaintiff was entitled." *Basista v. Weir*, 340 F.2d at 87.

Dealing with the appellant's contention that the trial court erred in finding that the defendant unions were not liable for the operation of the seniority system as it existed at Clow, we note that this decision by the trial court was largely a finding based on disputed facts. While the fact-finder might have decided differently on this question, we are unable to conclude that the trial court's decision on the seniority issue was clearly erroneous. Finally, appellants complain of the failure of the trial court to award interim attorneys' fees. We conclude that the trial court did not abuse its discretion in postponing this issue until this appeal was perfected. Upon remand, this issue, of course, will be open for the trial court's consideration at the time it issues its final judgment.

IV. CONCLUSION

The judgment is REVERSED and the case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV77-PT-1235-S

JAMES HOWARD, *et al.*,
Plaintiffs,

v.

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, *et al.*,
Defendants.

[Filed June 1, 1983]

FINDINGS OF FACT

The plaintiff, James Howard, was employed at Clow Corporation's Tarrant City, Alabama plant beginning in 1939 and remained employed until his retirement in 1980. Howard was a member of Local Union 100, International Molders and Allied Workers Union and the International and served as Vice-President of the Local for several terms both before and after 1965. He also served on committees which negotiated collective bargaining agreements before and after 1965, including the 1971-1972 negotiations. Howard served on the negotiating committee and signed the 1972 Contract, the 1974 Contract and the 1978 Contract.

Robert Bates was employed by Clow Corporation in 1962 where he remained employed until his retirement

in 1980. Bates was a member of Local # 100 and the International and was subject to the terms of the collective bargaining agreement.

Clow Corporation is an employer as defined in Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (b).

On November 5, 1975, Howard filed an EEOC charge No. TBIG-0833 naming as respondent the "International Molders and Foundry Workers Local 100," "1409 Pinson Street, Tarrant City, Alabama 35217." The charge stated that "I believe that the above named labor organization continues to discriminate against me because of my race (Negro) by refusing to represent me fairly and by acquiescing with Clow Corporation in their unlawful employment practices." An affidavit attached to the charge signed by Bates and Howard included, "We have tried repeatedly to get representation from the Union but to no avail. We also feel that the *International* is complying with the Local and Clow Corporation in their unlawful employment practices." (Emphasis added.) Bates filed an EEOC charge the same day making the same allegations and naming Local 100 as the party who discriminated against him.

Local 100, International Molders and Allied Workers is the successor to Local 100, International Molders and Foundry Workers. Local 100 is a labor organization within the meaning of 42 U.S.C.A. § 2000e(d) and (e). Local 100 has represented employees in the production and maintenance departments of Clow Corporation's Tarrant City, Alabama plant since about 1936.

On May 26, 1977, the named plaintiffs made a request of the EEOC for a right-to-sue letter. On June 16, 1977, the EEOC sent right-to-sue notices to Bates and Howard which referenced Local 100, International Molders and Allied Workers Union, but not the International.

A complaint was filed on September 13, 1977, by Howard and Bates, individually, and on behalf of themselves and others similarly situated against Clow Corporation, the International Molders and Allied Workers Union and Local 100, International Molders and Allied Workers Union. The complaint alleged jurisdiction under 42 U.S.C.A. § 2000e and 42 U.S.C.A. § 1981. The court has jurisdiction of the International Union and of the Local Union under 42 U.S.C.A. § 2000e and 42 U.S.C.A. § 1981. The liability of the unions begins at the earliest on May 5, 1975. The potential liability of both parties ends at the latest on June 27, 1980, at which time the plant permanently closed.

This court finds that this case is appropriate for class treatment under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure and defines the class as follows:

> All black employees who were members of the defendant unions at any time between May 7, 1975 and June 27, 1980.

On March 31, 1982, the court issued its Judgment approving a proposed consent decree providing monetary relief to the class agreed to by the company and the plaintiffs. Because the company resolved and settled all of the remaining objections, the court directed entry of a final judgment but retained jurisdiction for the purposes of further proceedings against the non-settling union defendants.

Clow Corporation engaged in the manufacture of pipe and fittings at its Tarrant City, Alabama plant since early in the century until it closed in June 1980. The earliest record of union representation was in the 1930's when the International Molders and Allied Workers Local 100 or its predecessor union became the exclusive bargaining representative for the production and maintenance employees.

The initial phase of the manufacturing process at Clow, for both pipe and fittings, consisted of the conversion of raw materials from a solid state into a molten or liquid state. In this initial or "melting" phase of production, raw materials, in the proper proportions, were charged into one of the two 108″ cupolas for melting. The molten metal was then tapped from the cupolas and fed into a holding ladle for transfer to either the "pipe casting" or "fittings casting" areas of the plant. The melting operation was a unit for seniority purposes and consisted of 15 jobs that were required to perform such work. In 1972, as a result of the new progression program, all the jobs in departments 50 and 51 were placed in a single line of progression from labor grade 1 up to 8. By contract, vacancies were filed by seniority with appropriate consideration of skill, efficient service and physical fitness. Notice of the vacancy, except for select jobs and craft jobs, was required to be posted on the bulletin board for bid.

During the "casting" phase of pipe production, the molten metal was moved by transfer ladles into machine ladles that serviced centrifugal pipe casting machines, which were capable of making ductile iron pipe in 18 foot lengths ranging from 3 to 24 inches in diameter. After solidifying, the hot pipe was extracted from the casting machines. The pipe then began the "finishing" phase of production in which it was fed into annealing ovens that gave it the proper physical structure and hardness. After exiting the annealing oven, the pipe moved through several work stations where it was cleaned, rounded, weighed, hydrostatically tested, and approved by quality control personnel. From "finishing," 98 percent of the pipe produced by Clow moved by Tram cars to the "cement lining" phase of production. In this phase, a thin coat of cement was applied to the inside diameter of the pipe. Other operations conducted during this stage of pipe production included painting, application of the

Clow logo and other data, and the labeling of the pipe with the appropriate weight and thickness. After application of the cement lining, the pipe was transferred to curing runs where it remained for eight (8) hours while the cement cured. After curing, the pipe was moved to storage runs and the shipping area of the plant where it was either placed in stock or loaded for shipment to Clow's customers.

Until 1972, the shops where the casting functions and the related functions of annealing, weighing, testing, and clearing took place were divided into four separate departments, some of which were "dead end" departments. The highest paid jobs were only job classes 4 and 5 (of a range of 1 to 15) and transfer out of these departments resulted in the forfeiture of accumulated seniority. During the 1972 negotiations, the parties agreed to a new job progression system that grouped four formerly separate departments into the "pipe ship progression." Thus, employees could move laterally from the dead end departments to this line of progression which would lead to a higher paying job. For example, in department 9, the Core Room department, the highest job was that of core worker, job class 5. After the progression schedule was implemented, the core worker in department 9 could move laterally to a class 6 job as trough cleaner in department 10, and the employee would be in line for promotion to the highest paid job in the progression, the machine operator's job at class 11.

For fittings production, molten metal received from the "melting" phase of production was poured into an arc furnace in order to acquire the proper temperature for "fittings casting." In the "casting" phase of fittings production, the molten metal was poured into sand molds. The "casting" stage of fittings production also involved the production of urea sand cores that formed the openings in the fittings. In addition, "fittings casting" required the construction of wooden or plastic patterns

which were used to form the cavity of the fitting in the sand mold. During "casting" operations for fittings production, Clow personnel prepared molds, set cores into the molds, closed and clamped the molds, and poured iron into each mold. After cooling, the castings were removed from the mold and cleaned.

The "cleaning" phase of fittings production included shot blasting the fittings to remove excess sand, and general finishing of the fittings with hand-held, air operated chipping hammers and grinders. A portion of Clow's fittings were flange-type fittings. To produce flange-type fittings, Clow personnel machined the fittings and drilled bolt holes. Depending upon the type of fitting required by Clow's customers, the fittings may have been air tested, tar coated, and/or cement lined. Once they were cleaned, inspected and machined and/or cement lined as necessary, the fittings were placed into containers and either stored in inventory or shipped to Clow's customers.

Prior to 1972 the jobs related to the production of fittings and other related functions were divided into seven separate departments, some of which were "dead end" departments with little or no opportunity for progression. By merging these seven departments, the company formed the "sand foundry progression," which provided the employees, for the first time, with the right to make lateral transfers to better paying more desirable jobs. For example, the cement lining operator in department 40 was formerly limited to a job class 4, but as a result of the progression, he could move up laterally to fill a vacancy in either department 20 or department 30 at a job class 7, from which point he could progress to the highest rated job in the progression.

In addition to the production departments described above, there were also several service and support departments at Clow. Among these departments were the Maintenance Department, Mold and Pipe Machine Main-

tenance Department, Pattern Shop, Carpenter Shop and Maintenance Machine Shop, Grove Department, Material Handling and Shipping. The maintenance department at Clow installed new equipment, performed general equipment and machine repair, and conducted preventive maintenance throughout the plant. The hourly positions within this department were classified as craft jobs and included millwrights, mechanics, electricians, and welders.

The Mold and Pipe Machine Maintenance Department repaired and maintained the pipe casting machines and pipe molds. Among the hourly craft jobs in this department were Mold Welder and Mold Machinist.

Pattern Shop personnel at Clow built wooden or plastic patterns that were used to form the cavity of the fittings during casting. Among the hourly craft positions within this department were Pattern Makers, Pattern Riggers and Pattern Changers.

The Carpenter Shop (Department) at Clow built boxes for shipment, maintained the plant buildings and performed general maintenance duties requiring carpentry skills throughout the plant. The craft jobs of Carpenter "A" and Carpenter "B" were within this department.

The Maintenance Machine Shop (Department) performed all non-product machining at the plant. This department fabricated and repaired the parts required to maintain the machinery and equipment used in the manufacturing process. The hourly craft positions within this department were Machinists.

Based on the testimony and the stipulations the court finds that the seniority unit structure at Clow was functionally and rationally related to the necessities and requirements of a large manufacturing facility producing pipes and fittings and was in conformance with industry practice. The departments represented the company's attempt to organize the work and to utilize the worker's

skills in the most efficient manner. The departments all performed separate work requiring separate skills and the court is unable to say that a seniority system that conforms to the functional needs of production is not rational. The craft jobs (carpenter, electrician, etc.) were genuinely craft jobs that required the traditional skills associated with such jobs.

In addition to the organization of Clow employees into departments that corresponded to their functional relationship to the manufacturing process, the jobs within each department were organized into lines of progression. The lines of progression established the order by which employees progressed to better paying jobs as they acquired knowledge, skill, efficiency, and experience within the department. The progression schedules and rules of progression allowed employees to qualify for advancement to positions of greater responsibility and higher pay. Movement by an employee from a lower paying job to one with higher pay and greater responsibility within a line of progression was governed by the provisions of the collective bargaining agreement and the progression rules and depended upon an evaluation of the employee's qualifications with regard to the following factors: seniority, skill, efficient service, and physical fitness.

The earliest minutes in the record of a meeting between the management of National Cast Iron Pipe Company [1] (hereinafter "NCIP") and the committee representing its employees are dated November 6, 1936 (Plaintiffs' Exhibit 60). A D. I. Miller representing the company proposed to the committee representing the employees that they arrange a ballot within the plant by departments to elect the committee representing the employees. Robert Hollman testified that such a ballot was never circulated through the plant.

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[1] Clow Corporation bought National Cast Iron Pipe Company between 1951 and 1957. For purposes of these findings their names may be interchanged.

In 1937 there were seven departments in the plant: Maintenance and Electrical Department, DeLavaud Shop, Specials Foundry, Specials Foundry Cleaning Shed, Sand Cart Shop, Shipping Department, and DeLavaud Runs. The July 8, 1937 minutes (Plaintiffs' Exhibit 62) reflect that six white persons were selected as committemen from six of the departments. The committeeman from the DeLavaud Runs was to be "named" later.

The committee representing its employees negotiated a collective bargaining agreement on November 6, 1936. This agreement (Plaintiffs' Exhibit 60) expresses at paragraph three of the agreement, the manner in which seniority will effect promotion, lay-offs, reductions in forces, as follows:

> "Promotions and lay-offs shall be governed by seniority, individual skill and efficient service. It is the intention of the Company to give the utmost consideration to seniority in any questions involving lay-offs, reduction in force or promotions."

Before the Molders Union started representing the employees, the black employees worked all over the plant. Blacks, however, were prohibited from holding certain skilled and semi-skilled jobs.

On March 26, 1937, Shelley Walden, the seventh vice president of the International Molders Union of North America, negotiated an increase in pay for the employees at NCIP that the Molders Union represented. A common laborer's pay increased by four cents to forty-two cents per hour, and the minimum wage of a semi-skilled laborer increased by six cents per hour. The common laborer jobs were held by blacks only (Plaintiffs' Exhibit 61).

Plaintiff's Exhibit 63 indicates that sometime prior to August 2, 1937, a departmental seniority system was put into effect. As of August 2, 1937, it is undisputed that the defendant International Molders Union of North

America, later to be called the International Molders and Allied Workers Union, was the exclusive representative of the employees. Claude Holiday, who was president of Local 100 at one time, stated that seniority was based on departments rather than age with the company (Plaintiffs' Exhibit 63). Charles Abney, chairman of the regular committee that represented the employees as of August 2, 1937, was present at this meeting when Claude Holiday said that seniority was based on departments rather than age with the company.

The International Molders Union of North America, later to be called the International Molders and Allied Workers Union, was the exclusive bargaining agent for the employees at NCIP and later Clow Corporation from 1936 until the pipe manufacturing operation shut down in 1980. For a brief period of time the Machinists Union represented machinists at NCIP, but the court finds that the brief period of time within which the Machinists Union represented machinists was too short to have any bearing upon the liability or non-liability of the defendants.

The International Molders Union of North America and thereafter the International Molders and Allied Workers Union participated in contract negotiations with local union officers and the employer at various times, including the time period in 1936 and 1937 when the departmental seniority system was created, and through the 1970's.

The International Molders and Allied Workers Union was sufficiently named in the charge of discrimination filed by the named plaintiffs Bates and Howard in their affidavit, which is a part of said charge.

Plaintiffs' Exhibit 64 indicates that on or about December 14, 1937, Marion Miller, a black employee, was operating the test press job that was formerly run by Sam Self, a white employee. Abney, chairman of Local 100,

brought up the fact that Marion Miller was not getting paid more for running the test press job than he received on his prior job. The company's response was that Mr. Self had been given more work to do than Miller and Miller had been hired on as a helper at a regular helper's rate and therefore not entitled to more money. Robert Hollman testified that the press job was a job that Marion Miller had operated in the old Sand Foundry before the new DeLavaud operation started and that he was familiar somewhat with the test press operation. The test press job was not a common laborer job.

The collective bargaining agreements in the 1930's were all one-year contracts. During the collective bargaining discussions on February 25, 1938 (Plaintiff's Exhibit 65), the International Association of Machinists and the International Molders Union proposed the following with respect to seniority: "Seniority should prevail in each department."

On March 1, 1938, the company's proposal for seniority was as follows:

> "Promotions and lay-offs shall be governed by seniority, individual skill and efficient service. It is the intention of the Company to give the utmost consideration to seniority in any questions involving lay-offs, reduction in force or promotions."

This proposal, which contained the above seniority provision, was rejected by the Molders and Machinists. Walden, the vice president of the International Molders Union of North America, finally agreed to the contract proposal made by the company which contained the provision for seniority as follows:

> "Promotions and lay-offs shall be governed by seniority, individual skill and efficient service. It is the intention of the Company to give the utmost

consideration to seniority in any questions involving lay-offs, reduction in force or promotions."

The company created a Crane Department on or about June 1, 1938 and allowed crane runners who had seniority in an operating department to retain the seniority in such operating department. Crane runners who had no seniority in any operating department were governed by Rule 3 of the collective bargaining agreement in the Crane Department only, and had no seniority in any other department other than the Crane Department. (Plaintiff's Exhibits 68 and 69.) All of the crane runners at this time were white. Blacks were then excluded from crane jobs and from the Crane Department. Until 1970, when Eddie Taylor and Ernest Coppins got "Millwright T" jobs, blacks were excluded from jobs other than common laborer jobs. In meetings between NCIP and the committee representing its employees, black representatives were segregated from white representatives. There is no evidence that this resulted from any union involvement.

There is substantial evidence that on the newly created DeLavaud Run, white employees were afforded opportunities to learn various jobs on the DeLavaud Run to the exclusion of blacks.

The contract negotiations on February 7, 1940 possibly indicated that, at the time, the employee committee's position on seniority was that the clause should say only that seniority shall prevail in each department. The company's position on the seniority clause was that the clause should state as follows:

"Promotions and lay-offs shall be governed by seniority, individual skill and efficient service. It is the intention of the Company to give the utmost consideration to seniority in any questions involving lay-offs, reductions in force or promotions. Seniority as herein used, means length of continuous service in

the department to which the employee is permanently assigned."

(Plaintiffs' Exhibit 72). Mr. Holiday of Local 100 stated it could mean that an unskilled man in the event of a lay-off, provided he had seniority. There is no evidence that, during this time, black employees were trained for skilled positions.

The company and the unions, with Mr. Shelley Walden present for the International Molders Union of North America, agreed that the company would work up a list of the seniority of each man in each department showing his seniority in that department and, after the list was agreed upon, any men to be transferred and others interested would be given notice of the seniority list of employees in each department (Plaintiffs' Exhibit 74).

On February 29, 1940, the company made a proposal covering seniority which was as follows:

"Promotions and lay-offs shall be governed by seniority, individual skill and efficient service. It is the intention of the Company to give the utmost consideration to seniority in any questions involving lay-offs, reductions in force or promotions. Seniority as herein used, means the length of continuous service in the department to which the employee is permanently assigned. Transfers of employees from one department to another which may be made at the discretion of the management, with the consent of the employee concerned, should not become permanent and cause the employee to lose seniority in the department from which he is transferred until the expiration of sixty days, during which period the transfer may be annulled at the request of the employee or the discretion of the management. If at the end of sixty days the employee is permanently assigned to the department to which he has been transferred, his seniority dates from the day first

transferred. Loans of employees from one department to another shall not give seniority in the new department nor cause loss of seniority in the old. . . ."

This particular clause was to routinely become embodied in subsequent collective bargaining agreements (Plaintiffs' Exhibit 75).

The company made a distinction based on race with respect to the initial hire of employees. Whites were hired into the Carpentry Department and blacks were hired into the Yards Department. Employees hired into the Yards Department often earned less per hour than employees hired into the Carpentry Department (Plaintiffs' Exhibit 54).

The company conducted its operations during periods when racial discrimination in our society was standard operating procedure. No segment of our society was unaffected including Union Hall and NCIP. *See* plaintiffs' Exihibit 3 (the October 25, 1951 minutes). The Ku Klux Klan's influence at the plant was questioned by Draper Doyle, the International representative for the International Molders and Allied Workers Union. Mr. Doyle apparently thought the Klan was present in the plant and told company representative Mr. G. W. Whitney of this fact at the October 25th meeting. Fred Hines, a black Local 100 representative, had brought the subject up of the Ku Klux Klan. Prior to this time black representatives had spoken little, if any, at company-union meetings. Robert Hollman testified that when he was cleaning up at Union Hall one evening he noticed the Klan conducting a meeting there.

At a March 14, 1956 meeting, which included union leaders, it was made clear that blacks were not expected to be involved in skilled positions or "handle tools." This impeded their ability to obtain skills which could result in even intra-department promotions.

In Plaintiffs' Exhibit 5, Local 100 President Jones stated that the proposal for bidding jobs by "colored" employees was rejected by the union. The company, through Mr. Warren Whitley, had said that it would be willing to bid "colored" jobs. The company maintained separate seniority lists with the acquiescence by Local 100 (Plaintiffs' Exhibit 5). Jones, the President of Local 100, wanted to increase job rates in other departments so that they would be higher than those in the Yards Department (Plaintiffs' Exhibit 5).

There is little question that, as late as 1958, both the company and Local 100 recognized that jobs were and should be categorized based on race (Plaintiffs' Exhibit 6). It is questionable, in some early stages after a bid system was established, whether black employees could bid or had their bids honored on jobs designated for "colored."

On June 4, 1957, John Martin, a black employee, entered a bid for the Machine Shop job as a laborer and was told he was ineligible to bid. Blacks were excluded from jobs in the Machine Shop, either by testing or by outright exclusion because of race. After the bidding system for "colored jobs" was established in September of 1957, by agreement of the company and the employee committee, a number of "colored jobs" became open for bid. These were a job in the Special Foundry Finishing Department, a job in the Shipping Department on October 23, 1957, two jobs in the Specials Foundry on November 7, 1957, and another job in the Specials Foundry on December 9, 1957, and one on December 12, 1957 for a trammer in the DeLavaud Finishing Department. Because John Martin did not bid on any of these particular "colored jobs" at the time they came open, he was laid off even though he was the oldest employee in the Yards Department (Plaintiffs' Exhibit 8).

The company and the Machinists Union agreed to a change in the seniority system on January 17, 1978. No

member of the International Molders and Allied Workers Union was present when the Company and the Machinists signed the agreement, but International Molders representatives Reid and Dockery ratified the agreement in subsequent contracts. The statement on seniority is as follows:

> "An employee who bids into a regular department has sixty days to determine whether or not he wishes to remain in that department. At the same time the foreman or supervisor of that department has sixty days in which to determine whether or not the employee is capable of handling the job.
>
> At the end of sixty days, provided the employee has not asked to leave a department and signed such a request in writing, and he is retained as an employee in the department his new departmental seniority will start as of the day he first entered the department.
>
> When an employee is rolled out of a department through lay-off or otherwise moved back to one of the 'pool' departments, he is eligible at once to bid on jobs posted for bidding. If he is the successful bidder, then the sixty day clause as above begins to take effect. During the first sixty days after becoming the successful bidder for the job, should the job he left, or was rolled out of come open and is posted for bids, he will have the opportunity to bid the job in which he has experience. If, however, the sixty day period has elapsed and his seniority has begun in the department into which he bidded, he becomes ineligible to bid into other departments as he is no longer considered a member of one of the 'pool' departments.
>
> This does not mean that a rolled back employee will not be used in a department where he has experience and where temporary vacancies occur. This proposal

in no way changes the regular seniority rules that govern promotions, transfers, etc.

This new seniority bidding clause was neutral in form but discriminatory in operation for there were only certain "colored jobs" that black members of the bargaining unit could bid on. The court finds no such restriction was placed on white members in the bargaining unit.

In the Yards Department, which was the labor pool department to which blacks were initially hired, the fork-lift job was filled by the oldest man in the Carpentry Pool Department, which was the department into which initial whites were hired.

Until the company and the Molders signed the 1972 collective bargaining agreement, the seniority system was a departmental seniority system and did not allow job bidding initiated by employees across departmental lines. Transfers by the company of an employee and loans by the company of an employee from department to department, however, could and were made at the discretion of management. Employees loaned by management from one department to the other did not accumulate seniority in the new department. Employees transferred from one department to the other by management did accumulate seniority in the new department after the employees had been in the department for over sixty days. An employee was always allowed to turn down a transfer within sixty days of the transfer.

The court finds that the 1972 negotiations between the officers of the defendant unions and the company representatives resulted in significant changes to the seniority system. After the company and the Molders signed the 1972 collective bargaining agreement, employees could bid across departmental lines one time, successfully, per year. If an employee transferred to a new department by bid and remained there for over sixty days, he lost the seniority he had earned in the prior department and his new department seniority began on

the day he entered the new department. This new seniority system—departmental seniority with one successful departmental transfer per year coupled with the loss of accumulated seniority—remained the same until the plant closed in 1980. Although this new seniority system significantly improved the opportunities for blacks to attain better jobs at the plant, the court finds that the new seniority system perpetuated the effects of prior discrimination. Accordingly, the court must now find whether or not the unequal treatment caused by the seniority system reflected an intent to discriminate because of race, color, sex, religion, or national origin, on the part of the company.[2] The court must decide whether the totality of the circumstances demonstrates purposeful discrimination.[3]

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[2] *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 349-55 (1977). The court's finding on the issue of intentional discrimination will dictate the court's conclusion on whether the seniority system is "bona fide" pursuant to § 703(h) of Title VII. *Id.* at 353.

In determining whether the company intentionally discriminated through the use of the seniority system, the court will be guided by the four factors named by the Supreme Court in *Teamsters* and expanded upon by the Fifth Circuit in *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978):

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter; whether that structure is rational and in conformance with industry practice);
>
> 3) whether the seniority system had its genesis in racial discrimination; and
>
> 4) whether the system was negotiated and has been maintained free from any illegal purpose.

559 F.2d at 352.

[3] *See United States v. Georgia Power Co.*, 634 F.2d 929, 935 (5th Cir. Unit B 1981), *vacated on other grounds sub nom. Local 84 v. United States*, 456 U.S. 952 (1982).

Did the seniority system operate to discourage all employees equally from transferring between seniority units? The seniority lists indicate that the seniority forfeiture rules were evenly applied; both black employees and white employees lost their accumulated seniority upon transfer. Facially equal application, however, is not determinative.[4] Whether the discouraging *effect* or *impact* of seniority system fell equally on blacks and whites is determinative.[5]

Prior to 1965, separate labor pools existed for newly hired black and white employees. Labor pools were comprised of employees who were not in an established line of progression within a particular department. When Title VII became effective on July 21, 1965, the company abolished the "Carpenter Labor Pool" (the white pool) and the "Yards Labor Pool" (the black pool). At the same time, the company announced that new employees would be hired directly into departments and that all new, unskilled employees would have the same starting pay. The company also announced its intention to retain departmental seniority, to promote without regard to race, color, religion, sex or national origin, to increase a number of job rates, to promote based on skill, efficient service, physical fitness, and departmental seniority, and that "everything else being equal. departmental seniority will govern the advancement." At that time the company also announced the abolition of separate jobs for blacks and white employees. In a meeting on September 18, 1969, the company announced that 40% of the employees were "working on jobs that were formerly prohibited to them—white on formerly colored jobs, or colored on formerly white jobs." Thus, the court finds that the employees in the less desirable, lower paying jobs in the late 1960's and early 1970's were both white and black.

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[4] *Id.*

[5] *Id*

The once-a-year bid clearly improved the advancement opportunities for blacks. Mr. Howard testified at his deposition that beginning in 1975 the opportunities for advancement of black employees considerably improved: "its just about broke wide open." Ten black employees entered the crane department, at one time an all white department, between 1973 and 1978.[6] One (W.D. Kelley) quit after 15 months and one (Abraham Holt, Jr.) was unable to qualify. The remaining eight successfully qualified and many progressed in the department: Cornelius Reddock became a Crane Trainee on 8/13/73, was promoted to Crane Operator on 11/12/73 in Department 54, transferred to Department 80 on 1/21/74 and to Crane Operator in Department 35 on 8/20/74; Mr. C.E. Calhoun, with a plant seniority date of 4/15/63, became a Crane Trainee on 10/8/74, completed his training and became a Crane Operator on 11/4/74, and on 9/6/77 became a Crane Operator in Department 40. The study shows that Reddock's and Calhoun's advancements were the result of successful bids on skill, efficient service, physical fitness and departmental seniority. The analysis reveals that many of the employees had plant seniority dates much earlier than their entry into the department. This indicates that these employees were dead-ended before passage of the 1972 modifications, which encouraged employees to bid into new departments. For example, Mr. Reddock had a plant seniority date of 5/10/48; Mr. Matthews had a plant seniority date of 8/21/63; Mr. Booker's plant seniority date was 5/27/41; Mr. Kelley's plant seniority date was 8/19/70; Mr. Holt's was 5/17/62; Mr. Jemison's was 9/24/62; Mr. Atkin's was 7/11/57; Mr. Collin's was 11/4/74; etc. Based on this evidence, the court finds that the new seniority system

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[6] T.R. Booker, Amos Holt, Cornelius Reddock, Norman Jemison, E. Atkins, R. Matthews, C.E. Calhoun, W.D. Kelley, H. Owens, Jr., and Abraham Holt, Jr. A study was done of this department.

operated to discourage all employees equally from transferring between seniority units.

Were the seniority units in separate bargaining units? No, all employers at the company were in Local 100 of the Molders Union.

Did the seniority system have its genesis in racial discrimination, and was the system negotiated and maintained free from any discriminatory purpose? The seniority system clearly had its genesis in a period of overt racial discrimination at the company and the court so finds. Blacks and whites were hired into separate departments and blacks had the lower-paying, unpleasant jobs that held little or no chance of advancement. In 1965, when Title VII became effective, these practices ceased; blacks and whites were hired into the same departments at the same wages. When the 1972 modifications to the seniority system became effective, blacks finally had the same seniority rights that whites did. Although the seniority system was still primarily a departmental system (except for the once-a-year successful transfer provision), the court finds that the seniority system was functionally and rationally related to the necessities and requirements of a large manufacturing facility producing pipes and fittings, and that the seniority system was in conformance with industry practice. The departments represented the company's attempts to organize the work and utilize the workers skills in the most efficient manner. Based on this evidence, the court finds that the seniority system was negotiated and maintained free from any discriminatory purpose beginning in 1972.

Although the seniority system had its genesis during a period of racial discrimination, the court finds that the totality of the circumstances surrounding the seniority system does not demonstrate an intent to discriminate by the company. The seniority system, which was

first negotiated in 1936, was basically a departmental seniority system until 1972. It was created at a time when it was recognized that blacks would not be assigned to certain departments. However, the court cannot say that the purpose of the departmental seniority system was, in and of itself, to discriminate against blacks. The discrimination against blacks resulted from their being substantially confined to common labor jobs without any intent to assign them to various departments, seniority or not.

Prior to the effective date of Title IV (July 2, 1965), the company did not use written tests to select employees for promotion or to select employees for entry into certain departments. Prior to 1965, the company did use tests for supervisors. After July 2, 1965, the company started using testing of employees prior to entry to jobs and departments. The union defendants did not oppose this.

Ernest Coppins and Eddie Taylor, black employees in the Maintenance Department, had over twenty years of seniority in the department as of July 2, 1965, but were among the lowest paid men in the department and had the lowest rated jobs. Mr. Whitney, the company representative, said that these men would bid at the next rate above their present rate in the Maintenance Department (Plaintiffs' Exhibit 17). As shown by the testimony, these men were required to take written tests, which they failed on at least two occasions between 1965 and 1970. Later they were allowed to move up to the newly created Millwright T job without taking a test. Jobs for which the mechanical comprehension test were required were the electrician job, pattern shop, night DeLavaud maintenance laborer, machinist, millwright, machine shop laborer, maintenance shop, flange shop laborer, air test—flange shop, mold sand blast operator, pattern changer assistant, pattern rates and inspector (Plaintiffs' Exhibit 57).

The minutes of the June 16, 1965 meeting reflect that Robert Hollman, a black member of the union committee, asked about plant seniority (Plaintiffs' Exhibit 17). Whitney said plant seniority was recognized insofar as vacations, insurances, annuities and lay-offs were concerned. He did not respond to the issue of plant seniority for bidding. In the minutes of March 21, 1969, Robert Hollman said that he felt that all select jobs should be open for general plant bidding and the company should set the qualifications for the job and select from a list of bidders. The representative of the company, Mr. Weaver, responded that he would do that but eventually he would set up job requirements and a training period for skilled jobs (Plaintiffs' Exhibit 20). However, craft jobs never became open for plant wide bidding. After the 1972 negotiations certain select jobs became open for bidding on a plant-wide basis one time per year.

The minutes of August 20, 1970 (Plaintiffs' Exhibit 22) concerned a grievance from Ernest Coppins and Eddie Taylor. Though the grievance is not attached to the minutes as referred to in the minutes, the court finds that the grievance relates to the complaint of Coppins and Taylor regarding the requirement that they take and pass a test and pass same prior to advancing to the Millwright E job in the Maintenance Department. The grievance is quoted as saying that Coppins and Taylor complained that their civil rights were violated. The union agreed with the company that their grievance was not subject to the grievance procedure. The 1968 contract, which was then in effect at the time this grievance was filed, included an anti-discrimination clause. Plaintiffs' Exhibit 22 shows that no union representative contested the company's determination that the grievance of Coppins and Taylor concerning the test was not subject to the grievance procedure. The union offered no reason at this August 20, 1970 meeting as to why it did not pursue the grievance on behalf of these black

union members. According to Frederick Kreitlein (Plaintiffs' Exhibit 47), the only thing that stopped the company from using the test was the plaintiffs' lawsuit which caused an abrupt halt to the use of the test in 1977. As a result, the court finds that Coppins and Taylor were without representation in their grievance seeking to prove that the employer breached the 1968 contract.

The answers to interrogatories of Clow Corporation show that of the eighty blacks who took this mechanical comprehension test, only ten passed; and of the one hundred eighty-four whites who took the mechanical comprehension test, one hundred three passed. The selection rates for the class of black employees who took the test is less than eighty percent of the selection rate of the whites who took the test and a presumption of discrimination arises from the use of the test.

A comparison of plaintiffs' exhibit 58 with plaintiffs' exhibit 59 shows that the new seniority provision contained in the 1972 contract, which allowed once a year plant-wide bidding across departmental lines, had some effect in eliminating racially identifiable departments. Plaintiffs' exhibit number 58 shows that there were nine racially identifiable departments as of September 1965. Of those nine, department numbers 9, 14 and 54 were all black; department numbers 40 and 50 were predominantly black; department numbers 60, 64 and 65 were all white; department 62 was predominately white. On June 26, 1978, there were seven racially identifiable black departments and five racially identifiable white departments. Departments 14, 30, 45 and 51 were all black; departments 20, 54 and 77 were predominately black; department number 65 was all white; department numbers 95, 60, 62, and 68 were predominately white. Testing impeded the employment opportunities of blacks who sought entry into all white departments and jobs contained therein which were more remunerative positions.

Paragraph E of Article 7 of the 1974, 1978, and 1981 Contracts provided that employees who had progressed

to the top of their departmental progressions qualified for a lateral transfer to a higher rated job in his area. This section of the contracts also listed the areas and progressions that were grounded together for purposes of lateral progression. Testimony established that the progression rules were instituted as a result of the 1972 negotiations, although the progression schedule was subject to modification in subsequent collective bargaining. The incentive pay system affected an individual's choice to change jobs because to transfer from a high incentive job to a job at a higher labor grade might result in a smaller rate of pay.

Under the 1972 and 1974 contracts, the criteria used by the company to fill jobs for all labor grades were seniority, skill, efficient service, and physical fitness. In the 1978 and 1981 Contracts, the criteria used to fill jobs were seniority, skill, efficient service, and physical fitness for all labor grades with the exception of labor grades 1 through 4; only seniority and physical fitness were the only two criteria considered in filling jobs in labor grades 1 through 4. The 1972 line of progression rules provided among other things that an employee could change his line of progression by using his once-a year bidding right, that an employee who declined a promotion was "frozen" but could change his mind at the time of the next vacancy, that a job would be placed for plant-wide bid if no one in the line of progression moved up, that the senior qualified employee had the right to the promotion, that if an employee allows a junior employee to go around him in the progression, "that junior employee will always be around him, however, in case of a lay-off or roll-back, that junior employee will return the same way he went up."

Under the terms of the 1972 through 1981 Contracts, Clow exercised managerial discretion in the choice of employees for craft jobs to insure that qualified candidates were placed in such jobs without regard to length of service in the plant. Craft jobs were described in the 1972

through 1981 contracts as jobs requiring special skills, experience, training and responsibility. These Contracts provided that employees would be considered for vacancies in craft jobs if they signed a list of applicants which was maintained in the Employee Relations Office. The process by which an individual was chosen to fill a vacancy in a craft position at Clow included an evaluation by the applicable manager or supervisor of the individual's technical competence and skill levels with respect to the particular craft position for which that individual applied.

Most craft employees were hired from the outside as fully qualified journeymen. Beginning in 1978 the company instituted an apprentice training program for craft employees: electrician, millwright, machinist, and patternmaker. Five union officials including James Howard executed a statement that the union did not wish to be part of the administration of the apprentice program.

Since July 2, 1965, certain bargaining unit jobs at Clow, known as "select jobs" have been filled without reference to a line of progression or seniority. The company insisted that it have discretion in filling the select jobs because the company considered those jobs to be critical to Clow's overall plant operation, since the jobs required individuals with special technical competence, skill, prior experience, and/or reliability. Vacancies in select jobs at Clow were filled by both internal and external applicants. The union did not strongly oppose this system.

In the 1972 negotiations, the union proposed and the company agreed to remove some 23 jobs from the select job list. As a result, these 23 jobs would be posted and filled by seniority, leaving eight select jobs. Thereafter the melting department was assigned the select jobs of control room technician, environmental control technician, and melting platform technician. A casting machine technician was assigned to the pipe casting department.

Pipe finishing select jobs included quality control inspector and annealing oven operator. The locomotive crane operator and the grove operator job were select jobs assigned to the shipping department. The court finds that the job description and classification program, the merged departments, the progression rules, the lines of progression, training programs for craft employees, reduction in the number of select jobs, the right to file grievances and to proceed to final and binding arbitration all benefited black employees and served to advance employment opportunities for black employees at Clow.

Plaintiff alleges that the company discriminated against them based on race in filling craft and select jobs. Plaintiffs have failed to put on any evidence that the company intentionally discriminated against plaintiffs in the selection of craft and select jobs. Accordingly, the court finds that the company did not intentionally discriminate in its assignment of craft and select jobs.

There is evidence that the company equated plant seniority with inefficiency and waste and had no intention of making any further concessions respecting seniority. Thus, it is speculative only to conclude that Union demands for seniority concessions would have been effective. There was uncontradicted testimony that within Local 100, no suggestions or demands were forthcoming from the membership for changes in the seniority structure as it existed after 1972.[7] The union's policy and practice was to post a notice on the plant bulletin board announcing a special meeting to formulate bargaining demands to present to the company for a new contract. There was no testimony that the negotiating committee suppressed or censored the proposals to eliminate any respecting seniority modifications.

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[7] Mr. Kreitlein, a former company official, testified in deposition that he was unaware that the black employees were dissatisfied with the once-a-year bid opportunity (p. 110).

The employee work force and the union membership was composed of approximately equal numbers of black and white members. In the 1972 negotiations the committee consisted of 5 black members and 5 white members. At that time a black member served as Chairman of the Shop Committee with administrative responsibilities under the Contract. Blacks served on the committees for the 1974, 1977 and 1980 negotiations. Black candidates were elected to union office, on some occasions defeating white opponents.

Grievances by black employees protesting violations of the contract were filed, processed and, absent settlement, appealed to arbitration in appropriately equal numbers as those for white employees. Black employees served on the shop committee and on occasion as chairman of the shop committee and there is no evidence that Local 100 was less aggressive in pursuing grievances for black employees than for white employees. The minutes of company-union meeting over a period of years reveals that Robert Hollman, a black committeeman and on occasion the Chairman of the Committee, was articulate and vocal in asserting the rights of black employees (and indeed, all employees). The record reveals that Mr. Hollman voiced criticism of the company's testing program on January 19, 1970, demanded that the company abolish select jobs on February 9, 1970, demanded plant-wide seniority on June 5, 1972 and at the same meeting demanded better training (longer training periods) for employees. At these times, Mr. Hollman was acting as Local 100's representative and his efforts are attributable to that defendant since he was its agent.

The minutes of the meeting of August 11, 1975, reveals that white committeemen also demanded an end to the use of tests. The minutes also show that during the meeting of February 9, 1972, the union demanded that the company post and bid all select and craft jobs.

The evidence is that upon request the union aggressively pursued grievances by black employees and obtained results were possible.

None of the plaintiffs' witnesses denounced the Local or the International as indifferent or hostile for racial reasons. For the most part, the plaintiffs' witnesses recounted only what the union had failed to achieve in collective bargaining. The witnesses did not reveal incidents suggesting that the officers and agents of the union's were racially hostile to them or to their asperations, either with respect to particular grievances or with respect to the larger goals of achieving equal opportunities at the plant. The plaintiff's witnesses did not accuse the union of altering the bargaining strategy to the detriment of black employees, of failing to investigate black grievances, of excluding blacks from participation in the internal affairs of the union or the collective bargaining process, or of failing to heed black suggestions for changes in the labor contracts. The court cannot equate failure to achieve in collective bargaining with failure to achieve because of racial animosity.

The failure of blacks to transfer into top rated journeymen craft jobs is noted but, on the other hand, there is no evidence that white employees transferred directly into top rate craft jobs. The company required that all employees be hired as a qualified craftsman or the employee would necessarily have to acquire the requisite skill by progressing through a normal progression schedule required of all unskilled employees beginning at the lowest rated job as stated in Plaintiffs' Exhibits 8 and 26.[8] There was no testimony or other proof that fully qualified black craftsmen were working out of classification and declined the transfer for fear of loss of seniority.

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[8] See the Kreitlein deposition at pages 120-125. The pattern was that vacancies at the top rate were filled by hiring and vacancies at the bottom were filled by bid.

The records do reveal transfer of black employees into craft departments and progress to the top rated job. Records reveal eight employees, six of whom were black, entered the beginning machinist E category by bid in 1976. J. E. Bradford, W. McGinnis, and W. A. Neeley were three of those six black employees. Their plant seniority dates were, respectively, 11/24/69, 6/4/63, and 8/25/63. The exhibit shows Mr. Bradford's progression to Machinist D on 9/20/76, to Machinist C on 3/21/77, and to Machinist B on 9/12/77. Mr. J. E. Parks, who had a plant seniority date of 8/5/68, transferred from laborer in department 78 to Machinist E on 5/3/76, to Machinist D on 9/20/76, to Machinist C on 3/21/77, and to Machinist B on 9/12/77.

Through comparison of the seniority lists of 1965 and 1978 (plaintiffs' Exhibits 58 and 59), the plaintiffs assert that there was no change in the racial identity of the departments.[9] For example, the plaintiffs claim that Departments 7, 14 and 54 were all black in 1965 whereas Departments 14, 30, 45 and 51 were all black in 1978. The significance is that by 1978, Departments 14, 30 and 45 were in a line of progression and provided the opportunity to advance to the top rated job in either the pipe shop or the fittings foundry. The remaining Department, 51, had been merged with Department 50, a formerly predominately black department, to create the melting line of progression that provided the opportunity to progress to the top rated job. The plaintiff overlooks the integration by 1978 of four formerly all-white Departments (60, 62, 68 and 95) and the reduction of all white Departments from 3 to 1 by 1978. Only the Carpenter Shop, which included only three employees, was all white by 1978. The departments predominantly black in 1965

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[9] Although the 1965 seniority list (plaintiffs' Exhibit 58) contains the racial designations the 1978 list does not. Assuming the accuracy of the plaintiffs' description of the 1978 list an analysis fails to support the conclusion that the composition of the departments was unchanged from 1965 to 1978.

(40, 50 and 62) had changed by 1978. Department 40 was placed in the said foundry progression in 1972 and Department 50 was merged with Department 51. The predominantly black Departments in 1978 (20, 54 and 77) had been placed in a line of progression (Departments 20 and 77) were in the said foundry progression and the racial makeup of Department 54 changed from all black to predominantly black.

The approximately equal racial mixture of the important local union committees and the total membership itself both before and after 1965, but more particularly thereafter, does bear some weight in the considerations involved in passing judgment on the union's record in representing its black members. There is no evidence of an accusation of intimidation or coercion practiced against black employees or that the union was dominated by a hostile white majority. The union's method for determining its collective bargaining strategy was open to black members as well as white members.

Hildridge Dockery, the representative of the International Molders Union, became the advisor of the International for Local 100 in 1972 and remained the advisor for Local 100 until the plant closed in 1980. Dockery promoted and helped bring about the 1972 modifications in the seniority system. Dockery testified that he worked closely with the bargaining committee, advising them and suggesting proposals for contract negotiations. Dockery did not bypass the bargaining committee and take his advice and suggestions to the membership directly.

Dockery unsuccessfully urged the bargaining committee in 1974 to seek a plant wide seniority system. He testified that the committee liked the current once-a-year transfer system and they did not want to change it. Dockery testified that he did not learn of the company testing program until sometime after he began his stint as the International representative. Dockery testified that Robert Hollman and George Estes had complained about the tests.

The court finds that Dockery, the International representative, acted as the local union's advisor from sometime in 1972 until the plant closing in 1980. The court further finds that he was intricately involved in the operation of the bargaining committee and the formulation of Local 100's bargaining positions. He supported and proposed plant-wide seniority after 1972 in his dealings with the bargaining committee. He clearly knew about the testing of employees by the company, but there is no evidence that he suggested or proposed to the bargaining committee that they oppose the company's testing program.

CONCLUSIONS OF LAW

Plaintiffs have brought the following five claims against the defendant unions:

1) defendants violated 42 U.S.C. § 2000e-2(c)(3) and 42 U.S.C. § 1981 by acquiescing in the institution and maintenance by the employer of the alleged discriminatory seniority system:

2) defendants violated the same two statutes by acquiescing in the alleged discriminatory initial assignment policies of the employer;

3) defendants violated the same two statutes by acquiescing in the employer's allegedly discriminatory assignments of craft and select jobs to the employees;

4) defendants violated the same two statutes by acquiescing in the administration by the employer of facially neutral tests that had an adverse impact on plaintiffs;

5) defendants breached their duty of fair representation in violation of 29 U.S.C. § 158(b) by making distinctions based on race among its own members on initial hiring and by failing to process the 1970 grievance filed by Ernest Coppins and Eddie Taylor.

The court will consider each of these claims separately.

The Seniority System

Plaintiffs claim that defendants are liable under § 703 (c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c)(3)[10] and 42 U.S.C. § 1981[11] because they acquiesced in the institution and maintenance by the employer of a seniority system that allegedly was violative of Title VII and § 1981. To establish a violation of Title VII by defendants, plaintiffs must prove first that the employer's seniority system was not "bona fide" pursuant to § 703(h) of Title VII, and second, that defendants caused or attempted to cause the employer to establish or maintain the allegedly discriminatory seniority system. If the employer's seniority system is "bona fide," pursuant to § 703(h) of Title VII, defendants cannot be liable under Title VII. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 353 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

A seniority system does not violate Title VII merely because it discriminates in effect against a particular group or, stated another way, has a disparate impact. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 349-50 (1977). To establish that a seniority system violates Title VII, the plaintiff must prove

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[10] This section states in pertinent part as follows: "(c) It shall be an unlawful employment practice for a labor organization— . . . (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c) (1981).

[11] Section 1981 states as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1981).

the existence of an actual intent to discriminate according to § 703(h) of Title VII. That section states in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, ...

42 U.S.C.A. § 2000e-2(h) (1981). A bona fide seniority system does not violate Title VII even if it perpetuates the effects of prior discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. at 352-54; *see American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

Before a court can determine a seniority system is "bona fide," and thus protected under 42 U.S.C. § 2000e-2(h), the court must resolve the ultimate fact issue: whether the differing treatment caused by the seniority system reflected an intent to discriminate because of race, color, sex, religion, or national origin. This issue is one of pure fact and the court's determination is a finding of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982); *Terrell v. United States Pipe & Foundry Co.*, 696 F.2d 1132 (5th Cir. Unit B 1983).

After consideration of the *Teamsters/Stockham Valves* factors, this court has found above that the differential impact of the company's seniority system did not reflect an intent to discriminate on the basis of race. Accordingly, this court now concludes that the seniority system was "bona fide" pursuant to 42 U.S.C. § 2000e-2(h). Thus, defendants did not violate § 703(c) of Title VII, 42 U.S.C. § 2000e-2(c), and the court does not reach the

issue whether defendants agreed to or maintained the allegedly discriminatory seniority system.

Plaintiff's claim under 42 U.S.C. § 1981 regarding the seniority system also must fail. The Fifth [12] and Eleventh [13] Circuits have held that § 703(h) is a defense not only to a Title VII claim, but also to a § 1981 claim.[14] Accordingly, this court concludes that because the seniority system was "bona fide" pursuant to § 703(h) of Title VII, defendant did not violate 42 U.S.C. § 1981.

Even if the court were to conclude that the seniority system was not "bona fide," defendants still would not have violated Title VII or § 1981, because they did not "cause or attempt to cause . . . [Clow Corporation] to discriminate against . . . [plaintiffs] in violation of this section [§ 2000e-2]" during the time period of defendants' potential liability (May 5, 1975 to June 27, 1980). 42 U.S.C.A. § 2000e-2(c)(3) (1981). The Fifth Circuit (Unit B) recently explained a union's duty pursuant to this section of Title VII:

> Section 703(c)(3) of Title VII makes it unlawful for a union to "cause or attempt to cause an employer to discriminate . . . ." 42 U.S.C. § 2000e-2(c)(3). We have recognized that under the Act "[l]abor organizations, as well as employers, have an affirmative duty to take corrective steps to prevent the perpetuation of past discrimination." *Meyers v. Gilman Paper Co.*, 544 F.2d 837, 850 (5th Cir.), *modified in other respects on rehearing*, 556 F.2d

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[12] *Scarlette v. Seaboard Cost Line R.R. Co.*, 676 F.2d 1043, 1050 n.18 (5th Cir. United B 1982); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

[13] *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1349 (11th Cir. 1983).

[14] Section 703(h) is a "defense" because a defendant can try to prove that a seniority system is "bona fide."

758, *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977) citation omitted).

. . . .

Whether a party involved in an established Title VII violation may be excused from liability therefore turns upon whether that party has proved to the full satisfaction of the courts that it has *taken every reasonable step to bring employment practices into compliance with the law.* In applying this test, we have recognized that even *a union which signs a contract establishing an unlawful seniority system may suffer no liability if it actively opposed the adoption of this system. See James v. Stockham Valves.*

Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112, 1129 (5th Cir. Unit B 1981) (emphasis added), *vacated on other grounds*, 456 U.S. 955 (1982). The plaintiffs in the *Terrell* case claimed that several unions, including the Steelworkers, bore legal responsibility, pursuant to 42 U.S.C. § 2000e-2-(c)(3), for the alleged discriminatory seniority system. During the late 1950's and early 1960's, the Steelworkers represented virtually all of the black workers at the employer's plant. Four craft unions, the Boilermakers, Machinists, Patternmakers, and Electrical Workers, represented almost all of the white employees at the plant during this time period. Virtually all of the blacks worked in the "dead-end" jobs. The white employees had better jobs and were in different seniority units. If an employee transferred into a different seniority unit, he lost all of his prior seniority. "[T]his inhibition upon transfers disproportionately prejudiced those workers in the predominately black Steelworkers union who had been assigned to the least desirable, dead-end jobs." *Terrell v. United States Pipe Foundry Co.*, 644 F.2d at 115.

The bargaining units at . . . [the plant] retained this racially divided structure until the time appel-

lants filed discrimination charges with the EEOC in 1969. In the period directly covered by this lawsuit, . . . [the employer] negotiated collective bargaining agreements with each of the unions in 1968, 1971, and 1974. Prior to this time the Steelworkers had repeatedly advocated plant-wide seniority. Armed in 1968 with the recently enacted Civil Rights Act, the Steelworkers proposed plant-wide seniority on the first day of negotiations. The company expressed a willingness to make the requested changes, but noted the need for the approval of the other unions. The craft unions strongly disapproved of any change, and the "lock-in" provisions remained intact.

In 1971, the company initiated the proposal of plant-wide seniority. The Steelworkers met privately with the other unions several times in an effort to gain their agreement to such a system. Again the craft unions prevented any change.

In 1974, the Steelworkers met with the craft unions in advance of their separate negotiations with the company in order to advocate plant-wide seniority. The craft unions were intransigent. The Steelworkers then agreed to a united union proposal to the company for plant-wide seniority qualified by a "unit preference" scheme which gave unit members priority consideration for job vacancies. While the Steelworkers and the company continued to express their preference for a complete plant-wide seniority system, both agreed to the compromise proposal.

Id., at 1116.

The Fifth Circuit ruled that the seniority system was not "bona fide" but that the Steelworkers bore no legal responsibility for the discriminatory seniority system because they took every reasonable step to oppose the system. *Id.*, at 1120.

> The Steelworkers local at . . . [the plant] was consistently represented by black officials who had every reason to oppose a seniority system which disproportionately prejudiced its predominately black membership. These officials appear to have taken every reasonable step to bring about plant-wide seniority, from initiation of this proposal on the first day of the 1968 negotiations with the company, to private lobbying efforts in 1971 and 1974 with the craft unions. Their acceptance of the "union preference" system in 1974 clearly represented a reasonable decision to gain some improvement, rather than suffering complete defeat at the hands of the craft unions.

Id., at 1121.

The Fifth Circuit reiterated the *Terrell* "every reasonable step" standard recently in *Waker v. Republic Steel Corp.*, 675 F.2d 91 (5th Cir. Unit B 1982). The court in *Waker* affirmed the district court's ruling that the local union was not liable for the maintenance of a discriminatory seniority system:

> Here, the Steelworkers' local was not controlled by blacks. Yet, the district court found that the local had pressed the company for the changes in the seniority system which plaintiffs now contend should have been made. This finding is amply supported in the record through testimony of union and company negotiators and one of the plaintiffs. The union minutes reveal that in 1962 the membership voted to pursue its demand for plant seniority. Thus, this union is distinguishable from that condemned in *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974), which made no "concerted attempt" to rectify discriminatory practices nor "actively sought plant seniority."
>
> The appellants point out that the local refused to strike over the seniority system. *Terrell* requires

> taking all reasonable steps. A strike is a drastic measure. Requiring such action could contravene the policies of the National Labor Relations Act and could be unreasonable. *See Thornton v. East Texas Motor Freight*, 497 F.2d 416, 426 (6th Cir. 1974). The union in *Terrell* did not strike, but settled for what it could get in light of craft union opposition. The trial judge properly found for the local on this issue in this case.

Waker v. Republic Steel Corp., 675 F.2d at 93.

In the case at bar, the Molders union successfully negotiated a change in the seniority system. For the first time, employees could transfer once a year from one department to another. Although the employees who transferred lost their accumulated seniority in their prior department, the new seniority system enabled blacks to escape the dead end jobs. The new seniority system was obviously a compromise; the union had sought a plant-wide seniority system. The Fifth Circuit pointed out in *Terrell*, however, that the union does not have to achieve its every goal to avoid liability under 42 U.S.C. § 2000e-2(c)(3). No suggestions or demands were forthcoming from the union membership for changes in the seniority structure as it existed after 1972. As was true in *Terrell*, several blacks served on the Molders negotiating committee during negotiations in 1972, 1974, 1977, and 1980. The court has found that the company had no intention of making any further concessions regarding the seniority system. Although union demands during the 1974, 1977, and 1980 negotiations for plant-wide seniority would not have been a "drastic" measure, as the Fifth Circuit used that term in *Waker* in reference to a strike, the court is satisfied that the union, given the company's position on seniority, took "every reasonable step to bring employment practices into compliance with the law," even though the union did not demand plant-wide seniority at the negotiating table after 1972. *Terrell*, 644 F.2d at 1120.

Accordingly, the court would conclude that the union defendants did not violate 42 U.S.C. § 2000e-2(c)(3).[15]

Because the court would conclude that the defendant unions complied with the *Terrell* "every reasonable step" standard, they clearly did not intentionally discriminate against the plaintiffs vis-a-vis the seniority system. Accordingly, the court would conclude that the defendant unions did not violate § 1981. *See General Building Contractors Ass'n, Inc. v. Pennsylvania*, —— U.S. ——, 102 S.Ct. 3141 (1982).

Initial Assignment

Plaintiffs claim that the defendant unions violated 42 U.S.C. § 2000e-2(c)(3) and 42 U.S.C. § 1981 by acquiescing in the allegedly discriminatory initial assignment policies of the employer. As the court has discussed in the Findings of Fact, the company assigned newly hired white employees to the Carpentry Department and newly hired black employees to the Yards Department. The company ceased this clearly discriminatory practice in 1965 when Title VII became effective. Although the defendant unions probably acquiesced in this practice, these discriminatory assignment practices ceased to occur almost ten years before the beginning of the unions' time period of potential liability (May 5, 1975). Accordingly, the court concludes that the defendant unions did not violate § 2000e-2(c)(3) or § 1981 as a result of their involvement in the employer's initial assignment policies prior to 1965.

Craft and Select Jobs

Plaintiffs claim that the defendant unions are liable for acquiescing in the employer's allegedly discriminatory assignments of craft and select jobs. Before analyzing

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[15] Of course, this "conclusion" is unnecessary in light of the court's conclusion that the seniority system was "bona fide."

the unions' roles, the court must determine whether the company's practices were discriminatory.

The company used its discretion in filling all select and craft jobs.[16] The company filled these positions with Clow employees and with persons from off the street. If a company employee applied for one of these positions, the company did not consider the employee's seniority; these jobs were not part of the seniority system.

Plaintiffs have not stated whether this Title VII claim is based on disparate treatment or disparate impact. Plaintiffs have not established the existence of any "neutral factor(s)," such as an employment test or specific work history requirements, that the company used to cull the list of applicants for the select or craft jobs. Accordingly, the court will treat plaintiffs' claim as one alleging disparate treatment.

Of course, to prevail on a claim of disparate treatment based on race, plaintiff must prove that defendants *intentionally discriminated* with regard to race. *See United States Postal Service Board of Governors v. Aikens*, 51 U.S.L.W. 4354, 4355 (U.S. April 4, 1983). The court has already found that the company did not intentionally discriminate in its assignment of craft and select jobs. Because the company's craft and select jobs assignments were not discriminatory, defendants clearly did not violate 42 U.S.C. § 2000e-2(c)(3) and 42 U.S.C. § 1981.

Testing

Plaintiffs allege that defendants violated 42 U.S.C. § 2000e-2(c)(3) and 42 U.S.C. § 1981 by acquiescing in the administration by the employer of facially neutral tests that had an adverse impact on plaintiffs. To pre-

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[16] In 1972, the company agreed to allow the employees to bid on 23 select jobs. Thus, only 8 select jobs were left to be filled by the company based on its discretion. The court is not able to determine how many craft jobs existed.

vail on this claim, plaintiffs must establish first that the mechanical comprehension test used by the company violated Title VII, and second, that defendants failed to comply with the *Terrell* "every reasonable step" standard.[17]

The Supreme Court ruled in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." A plaintiff makes out a prima facie case of discrimination by showing "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The employer then has the burden to establish that the test is job related. *Id.*

Clow Corporation used the mechanical comprehension test as a condition to promotion from 1965 (the effective date of Title VII) until 1977 (when this suit was filed). During those years, 56% (103 of 184) of the white employees who took the test passed it; only 12.5% (10 of 80) of the black employees who took the test passed it. The court concludes that plaintiffs established their prima facie case of disparate impact discrimination. Defendants did not rebut this presumption with any proof that the test was job related. Accordingly, the court concludes that plaintiffs established that the company's mechanical comprehension test, although neutral in form, had a discriminatory impact and violated Title VII.

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[17] Although the Fifth Circuit in *Terrell* and *Waker* applied this standard to situations involving seniority systems, this court assumes that the Fifth Circuit would always apply this standard to a labor organization's conduct that is challenged under 42 U.S.C. § 2000-2(c)(3).

Next the court must determine whether the union defendants satisfied the *Terrell* standard. Union representative Robert Hollman criticized the company's use of the test on January 19, 1970. White members of the union committee demanded that the company cease using the tests on August 11, 1975. The court has pointed out that the union members never demanded that the union attempt to persuade the company to stop using the tests, although Coppins and Taylor sought to challenge the validity of the tests through the grievance procedure in 1970. There was no evidence that the union committee ever demanded during the 1972, or 1977 negotiations that the company cease using the tests. Defendants did not establish that the company would have refused to stop using the tests.[18] The company's abandonment of the tests when this suit was filed illustrates that the company would have considered agreeing to halt the use of the tests. Accordingly, the court concludes that the local union violated 42 U.S.C. § 2000e-2(c)(3) because it did not satisfy the *Terrell* standard of taking every reasonable step to ensure that the employer complies with Title VII. Additionally, the court concludes that the local union violated 42 U.S.C. § 1981 because its conduct evidenced an intent to discriminate.[19]

An international union can be held liable for a discriminatory pracitce if it has a "sufficient connection" with the discriminatory practice. *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 851 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977). The Fifth Circuit in *Myers* adopted the

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[18] This situation is to be compared to the seniority system situation: there this court found that "the company had no intention of making any further concessions regarding the seniority system." *See* p. 36 *supra*.

[19] Labor organizations violate 42 U.S.C. § 2000e-2(c)(3) if they "*cause* or *attempt to cause* an employer to discriminate . . . ." (emphasis added). The court is of the opinion that this language indicates that conduct which violates the section (2000e-2(c)(3)) constitutes intentional discrimination.

holding of the Fourth Circuit in *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270-71 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976): "The Fourth Circuit recently held that a sufficient connection exists where, as here, the international union provided an 'advisor' to the local in its negotiations and the international approved the resultant collective bargaining agreement." *Myers v. Gillman Paper Corp.*, 544 F.2d at 851. The court has found above that Hildridge Dockery, the International Molders representative for the Local Union, worked closely with the bargaining committee as an advisor from 1972 until 1980. The court concludes that Dockery's activities provide a suffiicent connection of the International to the Local Union's violation of Title VII and § 1981. Accordingly, pursuant to *Meyers v. Gilman Paper Corp.*, the court concludes that the International also violated 42 U.S.C. § 2000e-2(c)(3) and 42 U.S.C. § 1981 for its conduct regarding the company's mechanical comprehension test.

Duty of Fair Representation

Plaintiffs claim that defendant unions breached their duty of fair representation, pursuant to 29 U.S.C. § 158 (b), because they 1) made distinctions based on race among its own members on initial hiring,[20] and 2) did not process the 1970 grievance filed by Ernest Coppins and Eddie Taylor regarding the company's mechanical comprehension test. Although the defendant unions' conduct regarding the initial hiring and Coppins' and Taylor's 1970 grievance probably constituted a violation of the duty of fair representation, the court cannot grant judgment for plaintiffs because their charges are not timely. The Fifth and Eleventh Circuit have held that the state statute of limitations for tort claims should ap-

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[20] This charge refers to the company's practice of assigning new black employees to the Yards Department and new white employees to the Carpentry Department. As discussed earlier, the company ceased this practice when Title VII became effective (July 2, 1965).

ply for actions claiming breach of the duty of fair representation. *Hand v. International Chemical Workers Union*, 681 F.2d 1308, 1313 (11th Cir.), reh'g granted, 692 F.2d 714 (1982); *Edwards v. Sea-Land Service, Inc.*, 678 F.2d 1276, 1292 (5th Cir. 1982); *Cox v. C. H. Masland & Sons, Inc.*, 607 F.2d 138, 143 (5th Cir. 1979); *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 114 (5th Cir. 1973).[21] Accordingly, the Alabame one-year torts statute of limitation, Alabama Code § 6-2-39, applies to plaintiffs' fair representation claims. Because these claims arose more than one year before plaintiffs filed suit (September 13, 1977), plaintiffs' fair representation claims are due to be denied.

Within one week after the entry of these Findings of Fact and Conclusions of Law, the plaintiffs will submit to the court a proposed order consistent with the Findings of Fact and Conclusions of Law. The defendants will respond thereto within one week, after which the court will enter an order.

This the 1st day of June, 1983.

/s/ Robert B. Propst
ROBERT B. PROPST
United States District Judge

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[21] Although the Alabama Supreme Court ruled that the contract statute of limitations should be applied to fair representation claims in *International Brotherhood of Electrical Workers v. Powell*, 370 So.2d 987, 989 (Ala. 1979), this court agrees with Judge Thompson's decision that the Fifth Circuit's ruling and not the Alabama Supreme Court's ruling is determinative for and binding on the District Courts. *Smith v. International Ladies Garment Workers Union*, 537 F.Supp. 347, 348-49 (M.D. Ala. 1981).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.: CV77-PT-1235-S

JAMES HOWARD, *et al.*,
Plaintiffs,

v.

INTERNATIONAL MOLDERS AND
ALLIED WORKERS UNION, *et al.*,
Defendants.

[Filed June 22, 1983]

ORDER

In conformity with the findings of fact and conclusions of law entered herein on June 1, 1983, the court finds in favor of the plaintiffs and against the defendants for their violation of 42 U.S.C. § 200e-2(c)(3) and 42 U.S.C. § 1981, for its conduct regarding the use of the mechanical comprehension test. The court denies all other claims made by the plaintiffs.

Within forty-five (45) days from the date this order is entered, the parties will attempt to arrive at an amount of monetary remedy for the plaintiffs to compensate them for the defendants' discriminatory conduct with respect to the mechanical comprehension test. If the parties are unable to arrive, in good faith, at a monetary remedy, then the court will enter such further or-

ders or decrees as are necessary to enable the parties to produce for the court their own procedures and formulas for the calculation of the monetary remedy due the plaintiffs. The court notes that the parties may reach such an accord as to amounts, etc. while reserving the right to appeal or seek other post-trial relief.[1]

DONE and ORDERED this 21st day of June, 1983.

/s/ Robert B. Propst
ROBERT B. PROPST
United States District Judge

[1] The court has considered the objections of defendants to plaintiffs' proposed judgment and considers them most appropriate for post-judgment consideration.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. CV 77-PT-1235-S

JAMES HOWARD, *et al.*,
Plaintiffs,

vs.

INTERNATIONAL MOLDERS and
ALLIED WORKERS UNION, *et al.*,
Defendants.

[Filed July 30, 1984]

REPORT OF SPECIAL MASTER

By prior order of U.S. District Judge Robert B. Propst, the undersigned magistrate was appointed as a special master to hear and determine the issue of damages on this action. Judge Propst had earlier entered an order in which he found in favor of the plaintiffs and against the defendant unions in connection with said defendants' discriminatory conduct with respect to the use of the mechanical comprehension test. All other claims made by the plaintiffs were denied. The parties having failed to arrive at an amount of a monetary remedy to compensate the plaintiffs, the issue of damages was ultimately referred to the undersigned as a special master to conduct a hearing and make a determination of said issue and to report findings of fact and conclusions of law to the Court.

After consulting with both counsel at a status conference, it was initially determined that the method for calculating damages was not clearly defined. Further, both counsel expressed some concern with regard to their ability to offer proof on the issue of damages. That concern is now well understood by the magistrate. Neither the plaintiffs nor the defendant unions have had direct access to any of the employer's records which obviously are pertinent to the issue at hand. However, both counsel have been able to obtain copies of many of the employer's records, and those records appear to be adequate for the purposes needed.

After Judge Propst was advised of the confusion concerning the method for calculating damages, he entered his "Supplemental Findings of Fact and Conclusions of Law" on March 7, 1984. The Court first stated therein that the sub-class of plaintiffs who are entitled to recover back pay are those plaintiffs who took any mechanical comprehension test administered by Clow Corporation between May 5, 1975 and October 15, 1977 and did not pass any such test. The Court then established the method for determining damages, as follows. The magistrate was first directed to determine the number of vacancies tested for *between May 5, 1975 and October 15, 1977*. The magistrate was directed to then determine the number of black and white employees who were tested during that time period. The magistrate was to then assume that the black and white employees who took the tests should have passed the tests in proportion to their numbers who took the tests and to further assume that vacancies should have been filled in those same proportions. Judge Propst then established the means by which to determine the back pay to which the sub-class is entitled; however, the determination of any entitlement to back pay depended upon a finding that black employees did not fill the vacancies in the same proportions that they took the tests.

Another status conference with both counsel was conducted after Judge Propst had set forth the detailed manner in which damages should be determined. It was decided that a hearing with regard to certain preliminary issues should be conducted and that a determination of those preliminary matters would determine whether a further hearing would be necessary. Subsequently, a hearing was conducted on March 30, 1984, limited to the following issues: (1) How many vacancies were tested for between May 5, 1975 and October 15, 1977? (2) How many black and white employees took the tests? (3) What are the proportionate numbers of black and white employees who took the tests? (4) Did black employees fill the vacancies to the extent of the proportionate number of them who took the tests?

At the hearing, there was only one witness, a lady by the name of Shirley P. Rutherford who had worked at Clow Corporation as personnel administrator. This witness was presented by defendants' counsel. The other evidence presented at the hearing consisted of copies of various records of Clow Corporation, summaries of those and other records, and exhibits from the January, 1983 trial of this case. Suffice it to say that the documentary evidence received at the hearing was voluminous.

Subsequent to the hearing, plaintiffs' counsel submitted copies of many Clow records and other records the source of which is not clear. Plaintiffs' counsel had been advised at the hearing that he could submit additional records if he deemed it necessary to supplement the documents which were offered into evidence at the hearing by defendants' counsel. However, after reviewing the documents submitted by plaintiffs' counsel after the hearing, the magistrate questions their relevance since they do not appear to furnish any new information bearing on the issue at hand. Defendants' counsel subsequently wrote a letter to the magistrate objecting to the plaintiffs' post-hearing submission, and at least one letter

from each counsel followed. Although plaintiffs' counsel informally communicated to the magistrate that he wished to respond to the last letter submitted by defendants' counsel, no such response has been received.

Notwithstanding the confusing state of the evidence, the magistrate has spent considerable time reviewing all of the documents and records submitted by the parties. As a result, the magistrate is firmly satisfied and convinced that he has been able to glean enough information from these records to make the pertinent determinations as directed by Judge Propst.

It should be initially noted that plaintiffs' counsel and defendants' counsel have a basic dispute as to the interpretation of "vacancies" as that term is used in the Court's "Supplemental Findings of Fact and Conclusions of Law," entered March 7, 1984. However, considering the use of that term in its proper context, the magistrate concludes that "vacancies" during the pertinent time period should include only those vacancies (as evidenced by "Job Vacancy" notices of the employer) for jobs (1) which required passage of the mechanical comprehension test, (2) which then current company employees bid for, and (3) for which one of the employee bidders was ultimately selected for a particular job. This means that the term "vacancies" should not include (1) those situations where bid notices were subsequently voided by the company or where no employees bid for the job, (2) those situations where the company records do not indicate who ultimately got a particular job (it is reasonable to assume that in such a situation the job was either not filled or was filled by someone outside the company work force), and (3) those situations where the records indicate that there were no successful bidders, either black or white, from within the company. With that interpretation of the term "vacancies," the magistrate will proceed to render his findings of fact and conclusions of law.

Findings of Fact

During the relevant time period (May 5, 1975-October 15, 1977), the only mechanical comprehension test given was the Bennett Mechanical Comprehension Test. Although these were generally referred to as "Form S" tests, Ms. Rutherford testified that sometimes a "Form T" test was given; however, she testified that these were essentially the same tests and that the different forms were merely variations where the questions were the same but were rearranged "to discourage cheating."

Notices of job openings were published within the company by posting "Job Vacancy" notices on the bulletin board, where they remained for 48 hours. These notices specified the name of the job which was vacant and usually specified whether passage of the mechanical comprehension test was required (although there were certain jobs for which passage of the test was clearly required whether noted on the form or not). If there were no employee bidders or if no successful employee bidders, a job vacancy was usually filled from outside the company. If a particular company employee was interested in applying for a job vacancy, he merely signed his name on a copy of the notice which was kept in the personnel office.

From the copies of various job vacancy notices which were received as evidence, it appears that Defendants' Exhibit 2 includes copies of all the job vacancy notices (which required passage of the mechanical comprehension test) during the pertinent time period. The magistrate has prepared a summary of those job vacancy notices, which is attached hereto as Exhibit "A' and which (1) names each job for which a vacancy notice was posted, (2) states the date each notice was posted, (3) states the number of employee bidders by race, (4) states the race and name of each successful employee bidder, if any, and (5) states whether each notice of job vacancy is or is not considered as "vacancy" for the purposes of

this inquiry (in accordance with the interpretation of the term "vacancies" as set out hereinabove).

As can be seen from Exhibit "A" hereto, there were vacancy notices posted for a total of 52 jobs requiring passage of the mechanical comprehension test during the pertinent time period. Of these, only 25 can be considered "vacancies" for the purposes of this inquiry. With regard to the other 27 job vacancy notices, the vacancies were not filled by employee bidders, either black or white, for one reason or another. All of this is clearly set forth in Exhibit "A" hereto.

Of the 25 vacancies for which employee bidders were selected, 13 of the bidders were black and 12 were white. Thus, 52% of the employee bidders who were selected for job vacancies during the pertinent time period were black, while only 48% were white.

Plaintiffs' Exhibit 4, which was received in evidence at the hearing, was offered by plaintiffs' counsel as a list of all active and inactive employees who took a mechanical comprehension test. The list designates the race of each employee, shows the date each test was administered, indicates which form of test was given, and shows the raw score of each employee tested. While this list includes employees tested at times outside the pertinent time period, and while there are relatively rare instances where the date of testing is not shown, it is possible to determine from this list the total number of black and white employees who were tested during the period from May 5, 1975 to October 15, 197. The magistrate has calculated these numbers and finds that a total of 76 white employees were tested and 42 black employees were tested (a total of 118 employees, both black and white). Thus, 35.6% of the employees tested during the pertinent time period were black. The magistrate notes that plaintiffs' counsel, in Plaintiffs' Exhibit 2 (which was not received in evidence since it is merely a summary of calculations made by plaintiffs' counsel), has calculated the numbers

only slightly different from the magistrate. Plaintiffs' counsel has concluded that the records (Plaintiffs' Exhibit 4) reveal that 75 white employees were tested and 49 black employees were tested. Even if those figures are used, only 39.5% of the total number of employees tested during the pertinent time period were black.

In conclusion, the magistrate finds that 25 vacancies requiring passage of the test existed during the time in question. Of the total employees tested during the pertinent time period, 35.6% (or, using the figures of plaintiffs' counsel, 39.5%) were black. Of the 25 job vacancies, 52% of them were filled by black employee bidders.

Conclusions of Law

Applying the assumptions specified by the Court to the above findings, black employees filled job vacancies to a *greater* extent than the proportion of black employees who were tested. If it is assumed that black employees should have passed the tests and subsequently filled the vacancies in proportion to the number of black employees who took the tests, then only 35.6% (or 39.5%, using plaintiffs' figures) of the black employees should have filled the vacancies. In fact, black employees filled the vacancies to the extent of 52%

Finding that black employees filled vacancies to a greater extent than the proportion of black employees who were tested, the magistrate concludes that, applying the formula specified by the Court, the sub-class of plaintiffs is not entitled to any back pay and that no damages should be required to be paid by the defendants.

In view of the foregoing, no further hearing on the issue of damages is necessary. The documentary evidence received at the earlier hearing is being submitted herewith to the Clerk. The hearing itself was recorded by a court reporter, but no transcript has been prepared. In accordance with *F.R.Civ.P.* 53(e)(2), the parties shall

have ten (10) days after being served with a copy of this Report within which to file written objections. Pursuant to said rule, either or both of the parties may apply to the Court for action upon this Report and upon objections hereto, if any.

The Clerk is hereby DIRECTED to serve a copy of this Report of Special Master upon counsel for the parties.

DATED this 30th day of July, 1984.

/s/ James F. Reddoch, Jr.
JAMES F. REDDOCH, JR.
United States Magistrate,
Acting As Special Master

Summary of Job Vacancy Notices From 5/5/75 to 10/15/77
(Where Mechanical Comprehension Tests Required)

Notices For Following Jobs	Date Notice Posted	No. of Bidders by Race (B = Black; W = White)	Race & Name of Successful Bidder, if any	Considered as "Vacancy"
(1) Labor-machine shop	5/19/75	6-B	B (H. Waldrop)	Yes
(2) Labor-flange shop	5/19/75	1-B	None	No (No W or B employee was selected
(3) Labor-flange shop	6/11/75	1-W/1-B	None	No (No W or B employee was selected
(4) Labor-flange shop	7/29/75	1-W/4-B	B (W. Ross)	Yes
(5) Millwright T	8/29/75	1-W	None	No (Bid voided-incumbent turned down new job)
(6) Millwright T	1/23/76	0	None	No (No bids received)
(7) Machinist E	3/16/76	1-W/5-B	B (J. Bradford)	Yes (Another B was selected and turned down job; a W was selected and disqualified)
(8) Millwright E	3/29/76	1-W	W (J. Argo)	Yes
(9) Labor-flange shop	4/19/76	1-W/5-B	B (F. Dunning)	Yes
(10) Machinist E	4/23/76	1-W/3-B	B (J. Parks)	Yes
(11) Labor-flange shop	4/27/76	4-B	B (R. Barnett)	Yes
(12) Labor-flange shop	5/6/76	2-W/5-B	None	No (No W or B employee was selected)

	Notices For Following Jobs	Date Notice Posted	No. of Bidders by Race (B = Black; W = White)	Race & Name of Successful Bidder, if any	Considered as "Vacancy"	
(13)	Labor-flange shop (same notice as 12 above)	"	"	"	"	"
(14)	Millwright T	5/28/76	2-W	W (D. Hulteen)	Yes	
(15)	Labor-flange shop	7/26/76	1-W/11-B	None	No	(No W or B employee was selected
(16)	Millwright T	7/28/76	2-W/2-B	B (F. Daniels)	Yes	
(17)	Machinist E	7/30/76	3-W/3-B	B (W. Neeley)	Yes	
(18)	Machinist E (same notice as 17 above)	"	"	B (Z. Jones)	Yes	
(19)	Labor-flange shop	8/13/76	4-W/5-B	W (J. Parker)	Yes	("job never filled" after Parker was selected but turned down job)
(20)	Machinist E	9/27/76	4-W/5-B	W (D. Harmon)	Yes	
(21)	Millwright T	12/6/76	7-W	W (D. Murphree)	Yes	
(22)	Millwright T	1/7/77	2-W/1-B	None	No	(No W or B employee was selected
(23)	Machinist E	2/14/77	4-W/2-B	None	No	(No W or B employee was selected)
(24)	Labor-flange shop	2/28/77	5-W/5-B	None	No	(No W or B employee was selected)

(25) Millwright T	3/14/77	1-W	None	No	(No W or B employee was selected)
(26) Mold sand blast operator	3/16/77	4-W/3-B	None	No	(No W or B employee was selected because job re-bid on 4/20/77)
(27) Millwright T	4/20/77	3-B	None	No	(No W or B employee was selected)
(28) Millwright T (same notice as 27 above)	"	"	"	"	"
(29) Mold sand blast operator	4/20/77	1-B	None	No	(No W or B employee was selected)
(30) Labor-flange shop	5/9/77	3-W/2-B	None	No	(No W or B employee was selected)
(31) Machinist D	5/11/77	1-W	None	No	(Bid posted in error—withdrawn)
(32) Machinist E	5/12/77	0	None	No	(No bids received)
(33) Pattern changer assistant	5/30/77	8-W/12-B 1 unk.	W (J. Dunnavant)	Yes	
(34) pattern changer assistant (same notice as 33 above)	"	"	B (W. Gunn)	Yes	
(35) Labor-flange shop	6/8/77	1-W/1-B	None	No	(No W or B employee was selected)
(36) Mold sand blast operator	6/17/77	0	None	No	(No bids received)
(37) Millwright T	6/29/77	2-W	None	No	(No W or B employee was selected)

Notices For Following Jobs	Date Notice Posted	No. of Bidders by Race (B = Black; W = White)	Race & Name of Successful Bidder, if any	Considered as "Vacancy"
(38) Millwright T	8/1/77	11-W/1-B	W (S. Spano)	Yes (No W or B employee selected for the other "several" openings referred to in the notice)
(39) Air test-flange shop	8/5/77	7-W/12-B	B (J. Fisher)	Yes
(40) Air test-flange shop same notice as 39 above)	"	"	B (R. Bates)	Yes
(41) Helper-flange shop	8/8/77	2-W/7-B	W (D. Mosely)	Yes
(42) Machinist E	8/10/77	2-W/4-B	None	No (No W or B employee was selected)
(43) Mold sand blast operator	8/31/77	1-W/1-B	None	No (No W or B employee was selected)
(44) Air test-flange shop	9/12/77	1-W/5-B	W (P. Handley)	Yes
(45) Machinist E	9/16/77	1-W	None	No (No W or B employee was selected
(46) Machinist E (same notice as 45 above)	"	"	"	" "
(47) Labor-flange shop	9/19/77	1-W/2-B	W (C. Welch)	Yes
(48) Millwright T	9/23/77	3-W	W (D. McCreless)	Yes

(49)	Millwright T (same notice as 48 above)	"	"	None	No (Only 1 of the 2 vacancies had an employee selected)
(50)	Machinist E	10/4/77	4-W/3-B	W (W. Casey)	Yes
(51)	Machinist E (same notice as 50 above)	"	"	B (C. Kendrick)	Yes
(52)	Millwright T	10/14/77	1-W/3-B	None	No (No W or B employee was selected)

Note: The company's Employee Service Records for the 13 blacks who were selected for jobs as shown above confirm that each of said employees did in fact fill the job opening for which he was selected. (See Defendants' Exhibit).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.: CV77-PT-1235-S

JAMES HOWARD, *et al.*,
Plaintiffs,

v.

INTERNATIONAL MOLDERS AND
ALLIED WORKERS UNION, *et al.*,
Defendants.

[Filed Nov. 29, 1984]

MEMORANDUM OF OPINION

This cause came on to be heard after the court had referred this action to a Magistrate as Special Master for a hearing with regard to damages after the court had found the defendant unions liable under Title VII for failing to take every reasonable step to insure that the employer complied with Title VII by abandoning the tests which had a discriminatory impact on black employees.[1]

---

[1] This court was likely incorrect stating that same failure resulted in a finding of intentional discrimination under 42 U.S.C. § 1981. The court did not and does not make the finding that there was otherwise direct or circumstantial proof of intentional discrimination.

The plaintiffs have objected to the report of the Special Master and the court has conducted a hearing thereon. The court finds and concludes that the report of the Special Master is factually accurate and the court accepts and adopts the same.[2]

The court, *sua sponte*, asked the parties to address whether *Connecticut v. Teal*, 457 U.S. 450 (1982) had application to the case. After receiving briefs from the parties, the court has determined that it does not. The court had already determined that the defendant unions were *liable*. The remaining issue was whether the class had suffered damages during the designated period. The court followed the procedure specified in *United States v. U.S. Steel*, 520 F.2d 1043 (5th Cir. 1975) and *Pettway v. ACIPCO*, 681 F.2d 1259 (11th Cir. 1982). This procedure resulted in a determination that the class suffered no injury or damages for the designated period. The plaintiffs have not proved, for the appropriate period, an actual wage loss as the result of discrimination. The class not having suffered any injury as the result of the failure of the unions to take action, the plaintiffs are not entitled to a recovery of back pay from these defendants.

A final judgment will be entered in favor of the defendant unions.

This 29 day of November, 1984.

/s/ Robert B. Propst
ROBERT B. PROPST
United States District Judge

---

[2] The court, in effect, replicates the Magistrate's findings.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.: CV77-PT-1235-S

JAMES HOWARD, *et al.*,
Plaintiffs,

v.

INTERNATIONAL MOLDERS AND
ALLIED WORKERS UNION, *et al.*,
Defendants.

[Filed Nov. 29, 1984]

FINAL JUDGMENT

In accordance with a Memorandum Opinion filed contemporaneously herewith, judgment is awarded in favor of the defendant unions Local 100, International Molders and Allied Workers and International Molders and Allied Workers Union. The action is DISMISSED with prejudice as to said defendants, all parties to bear own costs.

DONE and ORDERED this 29 day of November, 1984.

/s/ Robert B. Propst
ROBERT B. PROPST
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.: CV77-PT-1235-S

JAMES HOWARD, *et al.*,
Plaintiffs,
v.
INTERNATIONAL MOLDERS AND
ALLIED WORKERS UNION, *et al.*,
Defendants.

[Filed Dec. 3, 1984]

MEMORANDUM OPINION

The court hereby amends its Memorandum Opinion filed on November 29, 1984 to add the following sentence.

It may well be that, since there is no indication of any disparate impact, during the relevant period, the court should conclude that not only have plaintiffs failed to prove any damages for the relevant period, but that the court's finding and conclusion of liability should be vacated. The court also cites *Ingram v. Madison Square Garden*, 709 F.2d 80 (2nd Cir. 1983).

This 3 day of December, 1984.

/s/ Robert B. Propst
ROBERT B. PROPST
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

No. 85-7008

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,
Cross-Appellees,

WILLIE L. MCCOY, *et al.*,
Intervening-Plaintiffs-Appellants, Cross-Appellees

versus

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO-CLC, LOCAL #100 OF THE INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO-CLC,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING
(February 18, 1986)

Before: GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge

PER CURIAM:

The petition(s) for rehearing filed by appellee International Molders and Allied Workers Union, et al., is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

(3)

No. 85-1629

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, etc., *et al.*,

Petitioners,

v.

JAMES HOWARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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No. 85-1629

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, etc., et al.,

Petitioners,

v.

JAMES HOWARD, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

This is an employment discrimination action arising out of allegedly racially discriminatory practices at the Tarrant

City, Alabama, plant of the Clow Corporation, a manufacturer of industrial pipe and fittings. Named as defendants were Clow, Local 100 of the International Molders and Allied Workers Union, and the International Molders and Allied Workers Union. The union was the collective bargaining representative of the hourly employees at the Tarrant City plant.

This action was filed in September, 1977. In 1980 the Tarrant City plant closed, rendering moot all claims except those for monetary relief. In 1982 the company entered into a consent decree providing monetary relief to the class members; the union, however, declined to enter into a similar settlement. Respondents' claims against the union were tried in January, 1983.

Prior to 1965 the union had engaged in concerted action with the employer to exclude blacks from any of the well paid skilled and semi-skilled positions at the plant. (Pet. App. 24a, 27a, 28a) Blacks were expressly forbidden to bid on these white jobs; indeed, for years the union opposed even the creation of any bid system for the black jobs. (Pet. App.30a) The union insisted that no black worker, whatever his or her position, be permitted to use tools of any kind, and intervened on behalf of whites when several blacks were discovered to be using hammers and pliers on the job. (Pet. App. 29a)

When Title VII was adopted representatives of the company and union met to discuss joint action to "temporiz[e]" the

effects of the statute.[1] Shortly thereafter the company announced that, although blacks could bid on the formerly white jobs, any person seeking promotion to most of those positions would have to pass a newly adopted test. (Pet. App. 37a) The test measured an employee's familiarity with machinery and tools, knowledge which the union had for decades successfully demanded be kept from its black members. The district court found that this new test was successful in preventing the movement of most black employees into the positions at issue. (Pet. App. 39a) Almost 90% of all blacks who took the test failed it; whites passed the test at a rate 5 times as high as blacks. (Id.)

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[1] Minutes of meeting of May 12, 1965, p. 8.

In 1970 two blacks filed a grievance alleging that the test violated the anti-discrimination provisions of the collective bargaining agreement. The union refused without explanation to process the grievance, and reached an agreement with the company that the test was permissible under the union's contract. (Pet. App. 38a-39a). On repeated occasion blacks objected either to the union, or the union's chief contract negotiator, about the test, and the negotiator promised to "look into" the problem. (Pet. App. 58a; Tr. 492). The district court found, however, that neither that negotiator nor any other union representative during contract negotiations ever proposed that the test be ended or even reconsidered (Pet. App. 58a). The employer's willingness to accede to such a proposal was starkly

demonstrated when the company abandoned use of the test in 1977 immediately after the filing of the instant action. (Pet. App. 58a).

Respondent's complaint alleged, inter alia, that the union had violated Title VII and 42 U.S.C. § 1981 by knowingly acquiescing in the continued use of the allegedly illegal test. (Pet. App. 47a). The District Court recognized that a union was obligated to use reasonable efforts to eliminate a discriminatory practice if the union itself was "involved in [that] Title VII violation" (Pet. App. 51a), and held that the union here had such an obligation to seek an end to the illegal test. (Pet. App. 57a-59a). The District Court found that the union had made no effort whatever to meet that obligation, and was thus liable to the respondents. (Pet.

App. 58a-59a). Because of these factual conclusions the District Court did not find it necessary to decide whether the union's continued acquiescence in the test was racially motivated. (Pet. App. 58a n.19, 76a n.1) Following a subsequent magistrate's report, the district court concluded that no individual class members were entitled to any monetary relief. (Pet. App. 76a-77a)

On appeal the union expressly acknowledged that it would have been obligated to seek elimination of the test if it had ever agreed to or acquiesced in the use of that test. The union insisted, however, that no such agreement or acquiescence had in fact occurred. The court of appeals affirmed that finding of the district court that such an obligation existed under the particular circumstances of this case. The court of appeals

reversed the denial of monetary relief, and remanded the case for the fashioning of an appropriate remedy.

REASONS FOR DENYING THE WRIT

The decisions below do not, as petitioners suggest, announce or apply any rule imposing vicarious liability on an innocent union that merely fails to prevent employer discrimination. The actual holding of the District Court is as follows:

> Whether a party involved in an established Title VII violation may be excused from liability . . . turns upon whether that party has proved to the full satisfaction of the courts that it has taken every reasonable step to bring employment practices into compliance with the law.[2]

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[2] Pet. App. 51a (emphasis added and omitted), quoting Terrell v. United States Pipe & Foundary Co., 644 F.2d 1112, 1129 (5th Cir. 1981).

This language is taken verbatim from the earlier Fifth Circuit standard in Terrell v. United States Pipe & Foundary, 644 F.2d 1112, 1129 (5th Cir. 1981), and it was the Terrell standard which the Eleventh Circuit expressly applied in this case. (Pet. App. 2a-31, 13a). Terrell and its progeny are concerned, not with any affirmative duties of innocent unions, but with the legal obligations of unions that agreed to, acquiesced in, or otherwise caused a violation of Title VII itself.

Petitioners did not question below,[3]

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[3] Petition for Rehearing, pp. 3-6 ("[T]he Molders accept the 'Terrell test' with respect to those employment practices as to which the Union actively participates in creating . . . ."); Reply Brief of Cross-Appellants, 8 (approving "[t]he 'all reasonable means' test of such cases as Terrell v. U.S. Pipe . . ."); Brief of Defendants-Appellees, p. 51 ("A union need not successfully end a discriminatory practice to avoid liability -- it need only oppose the practice.")

and do not seek review by this Court, of the actual legal principle announced in Terrell and applied in this case -- that a union involved in unlawful discrimination must take affirmative steps to bring that discrimination to an end. Nor do petitioners suggest that there is any disagreement among the circuits about that principle. For over a generation there has existed among the lower courts, and within this Court, a unanimous agreement that a defendant must take action to disestablish discriminatory practices for which it bears significant responsibility. Terrell merely applies to Title VII that universal and uniformly accepted rule.

In some instances where a union bears partial responsibility for a discriminatory practice, the union may be unable to end that practice without the concurrence of the employer; rather than

impose strict liability in such a situation, Terrell requires only that a union do whatever is possible to alter the illegal practice. The "all reasonable effort" standard in Terrell thus marks a limitation on a defendant union's legal obligation. That standard was adopted in Terrell itself at the behest of the union defendant in that case, and the petitioners in the instant case expressly endorsed that standard in the court below.[4]

When a Title VII plaintiff alleges that a union unlawfully "caused" discrimination by an employer, there will almost invariably be difficult factual issues regarding the extent to which the union may have agreed to, deliberately acquiesced in, aggravated, or perhaps

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[4] See n. 3, supra.

promoted the practice at issue. The appellate decisions which petitioners assert conflict with the decision below in reality turned on just such factual issues. In Thornton v. East Texas Motor Freight, 497 F.2d 416, 425 (6th Cir. 1974), the defendant union local had formally requested the employer to end the illegal practice; in Williams v. General Foods Corp., 492 F.2d 399, 405 (7th Cir. 1974), the union had aggressively pursued a grievance challenging the unlawful practice. Under those circumstances the courts of appeals in those cases reasonably concluded that the respective unions had not "acquiesced" in or agreed to the disputed practices. See 497 F.2d at 425. Neither the sixth or seventh circuit disputed the obligation

of a union to take steps to end discriminatory practices for which it bore responsibility.

The instant case presented an essentially factual dispute that is typical of section 703(c)(3) claims. At trial respondents offered probative evidence that the union had knowingly acquiesced in the use of the discriminatory test, that the employer only continued to utilize the test because of that acquiescence, and that the test perpetuated the effects of earlier intentional union discrimination. Although there was conflicting testimony regarding a number of the subsidiary issues, we believe that substantial evidence supported the decision of the district court imposing liability on the unions.

First, the disputed test perpetuated in a particularly noxious manner the earlier intentional union discrimination. The specific test at issue in this case measured an employee's familiarity with basic tools and machinery. When that test was initially adopted in 1965, it was certain to exclude virtually all blacks seeking promotions, because the union had for years successfully demanded that no black be permitted to hold a skilled position where he or she might have acquired any knowledge of such equipment. The union had further insisted that no black at the plant, regardless of his or her position, should ever be permitted to use any tool whatever. The local union president expressly insisted at a meeting with company officials that "the colored laborers are not supposed to handle

tools", and the union intervened at the behest of white members when several black employees were discovered using hammers and pliers on the job.[5] Thus the practical effect of the post 1965 test was to prevent promotions of the very black workers whom the union had insisted be denied the experience necessary to pass such a test.[6]

Second, the local union deliberately and inexcusably refused to process a grievance challenging the use of the disputed test. In 1970, two blacks who had failed the test submitted a grievance to the union, alleging that the test violated the anti-discrimination provision of the collective bargaining agreement. Successful pursuit of this

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5 Pet. App. 29a; Tr. 204, 210-11; minutes of meeting of March 14, 1956, pp. 2-4.

6 Pet. App. 37a.

grievance would have ended use of the tests long before the filing of the instant action, but the union refused to process it. The district court found:

> The union agreed with the company that [the] grievance was not subject to the grievance procedure.... The union offered no reason ... as to why it did not pursue the grievance on behalf of these black union members.... [T]he court finds that [the black members] were without representation in their grievance seeking to prove that the employer breached the 1968 contract. (Pet. App. 38a-39a).

Union and company representatives discussed the merits of the test at length at a meeting on August 20, 1970, and reached at least a tacit agreement that the test would continue.[7]

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[7] The petition describes this incident as a union "protest" to the company about the test. Pet. 5. The district court found otherwise.

Third, despite repeated objections by black union members to the use of the test, the union refused to ever raise the subject in contract negotiations with the employer. In addition to the aborted 1970 grievance, a black union member complained about the test at a separate meeting during the same year (Pet. App. 58a), and in 1972 another black member on several occasions complained directly about the test to the union's chief negotiator. (Tr. 49a). Although the negotiator promised to "look into" the problem (Tr. 492) the district court found that he never in fact asked the company to change or even reconsider its use of the test. (Pet. App. 58a). In 1975 the Company expressly invited the union to raise with appropriate management officials any objections the union might

have to continued use of the test,[8] but the union thereafter raised no such objection.

If the collective bargaining agreement in this case had expressly approved the use of the illegal test, the union would clearly have been under an obligation to attempt to end the unlawful practice. Nothing in Title VII suggests that such union complicity had to be memorialized in a formal written agreement; the pattern of conduct found by the district court clearly constituted, and communicated to the employer, union endorsement of the disputed test. In this Court petitioners continue to insist otherwise, contending that the union "had not agreed to Clow's use of the test." (Pet. 5). Neither court below, however,

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[8] Minutes of meeting of August 11, 1975.

accepted petitioners' factual contentions, and the fact-bound controversy that lies at the heart of the petition does not warrant review by this Court.

CONCLUSION

For the above reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 85-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL MOLDERS and ALLIED WORKERS UNION, AFL-CIO-CLC, AND LOCAL 100 OF THE INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO-CLC,

Petitioners,

v.

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1629

INTERNATIONAL MOLDERS and ALLIED WORKERS UNION, AFL-CIO-CLC, AND LOCAL 100 OF THE INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO-CLC,

Petitioners,

v.

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF

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1. Respondents contend that "[t]he decisions below do not . . . announce or apply any rule imposing vicarious liability on an innocent union that merely fails to prevent employer discrimination." Resp. Br. at 8. Rather, respondents contend, "the actual legal principle . . . applied in this case [is] that a union involved in unlawful discrimination must take affirmative steps to bring that discrimination to an end." *Id.* at 10. That contention simply misstates the holding of the lower courts.

It is, of course, true as respondents note that the district court and court of appeals relied on the Fifth Circuit's decision in *Terrell v. United States Pipe & Foundry*

Co., 644 F.2d 1112 (5th Cir. 1981),[1] and that *Terrell* did impose a duty to "take[] every reasonable step to bring employment practices into compliance with the law" on a union which had agreed to an unlawful seniority system and thus was "involved in an established Title VII violation." *Id.* at 1120. But what respondents ignore is that in the instant case the courts below expressly *extended Terrell*'s rationale by holding that the duty to "take every reasonable step" is *not* limited to a union which is "involved in" a discriminatory practice but rather applies to *any* union which represents workers in a workplace where the employer is in violation of Title VII.

The opinion of the courts below could not be clearer in this regard. The district court stated that the respondents had to prove only two elements in order to prevail on their claim that the union unlawfully "acquiesced" in the company's use of the test:

> To prevail on this claim, plaintiffs must establish first that the mechanical comprehension test used by the company violated Title VII, and second, that defendants failed to comply with the *Terrell* "every reasonable step" standard. [Pet. App. 56a-57a].

And the district court announced that it "found the defendant unions liable under Title VII for failing to take every reasonable step *to insure that the employer complie*[*d*] *with Title VII. . . .*" (Pet. App. 76a, emphasis added).

The court of appeals affirmed on exactly the same basis. That court stated:

> Once the trial court found that the mechanical aptitude test had, during its entire period of operation, had a disparate impact on the minority class, it follows that it was the duty of the defendant unions under the *Terrell* standard to make every reason-

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[1] A portion of the judgment in *Terrell* was vacated, at 456 U.S. 955 (1982), on the petition of a party that was not subject to the holding described in the text.

> able effort to see that these tests were brought to an end. [Pet. App. 13a]

The opinions below thus leave no room for doubt as to their holding. Both the district court and the court of appeals squarely held that when an employer's practice violates Title VII, the union has a duty to take every reasonable step to bring about an end to that practice.

Indeed, had the courts below believed that the duty to prevent employer discrimination is triggered only if the union is "involved in" that discrimination, there would have been no basis for holding the union liable here, for the district court made no predicate finding of union involvement. The district court did not find that the union played any role in the company's decision to start using the test.[2] Nor did the district court find that the union thereafter agreed to the company's use of the test or in any other way took part in, or urged, encouraged, or approved its use. Indeed, the district court found that on two occasions the union protested the use of the test.[3] Furthermore, the district court found that the union had actively negotiated for contract changes that "enabled blacks to escape the dead end jobs" (Pet. App. 54a) and that "benefited black employees and served to advance

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[2] For example, in describing the decision to begin using the tests, the district court found:

> After July 2, 1965, the company started using testing of employees prior to entry to jobs and departments. The union defendants *did not opose this.* [Pet. App. 37a; emphasis added. *See also* Pet. App. 44a, 47a.]

[3] Respondents erroneously claim (Resp. Br. at 16 n.7) that the first of the two protests involved the filing of a grievance which ultimately was dropped. *See* n.4 *infra.* Respondents are mistaken: the first protest to which we refer was made by an authorized union representative in January 1970; it was not the August 1970 grievance. *See* Pet. App. 43a.

employment opportunities for black employees at Clow" (*id.* 42a). *See also* Pet. App. 43a-44a, 46a, 76a n.1. The *only* respect in which the district court faulted the union's conduct during the limitations period was for failing to take certain steps to oppose the company's use of the test.[4]

Respondents attempt to overcome the absence of findings of union involvement in the employer's testing by maintaining that the union "knowingly acquiesced in the

---

[4] *See, e.g.*, Pet. App. 35a, 43a-44a, 46a-47a, 58a. Each of the incidents of supposed union discrimination that respondents cite occurred prior to the limitations period and, in most instances, years before the enactment of Title VII. *Compare* Resp. Br. at 3, 14-15 *with* Pet. App. 24a, 27a-30a (dating incidents involving union as occurring in 1937 and 1958).

Respondents place special weight on a company-union meeting that occurred in August 1970—almost five years before the limitations period began—suggesting that the district court's findings regarding this meeting establish "at least a tacit agreement [by the union] that the test would continue." Resp. Br. at 16. But all that the district court found was that at the meeting in question the union agreed that the grievance procedure did not cover a grievance alleging that the test violated the "civil rights" of two black grievants; the district court did not find any other agreement by the union. Pet. App. 34a.

The district court did suggest that the grievance should have been covered because the collective bargaining agreement contained "an anti-discrimination clause." (*Id.*) Respondents take that suggestion one step further and argue that if the union had prosecuted the grievance an arbitrator would have ended the use of the test. (Resp. Br. at 15-16). But the district court did not so find, and respondents' argument is based on a facile assumption that a labor arbitrator in 1970 would have held that a contract clause prohibiting discrimination reached not only discrimination on the basis of race but also practices having a racially disparate impact—a theory that was not even established under Title VII until the following year. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 428 (1971) (the "disparate impact" issue was a "question of first impression" under Title VII). In all events, the district court's finding that the union failed to pursue this grievance in these circumstances cannot be equated with a finding of any kind of "tacit agreement" that the test would continue to be used.

use of the discriminatory test." Resp. Br. at 13. In so arguing respondents come full circle. For if, as respondents maintain, a union commits a wrong by "knowingly acquiesc[ing]" in an employer's discriminatory acts, it necessarily follows that to avoid liability a union has an affirmative duty to endeavor to prevent any act of employer discrimination of which the union is aware. Thus respondents' legal theory ultimately confirms what in any event is self-evident from the opinions below: the lower courts here held that every union—and not just a union involved in a discriminatory act—has a legal duty to prevent any act of employer discrimination of which the union is aware. This case therefore plainly raises the important legal question presented in our petition.

2. Respondents deny that the decision below conflicts with the Seventh Circuit's decision in *Williams v. General Foods Corp.*, 492 F.2d 399, 405 (1974). *See* Resp. Br. at 11-12. According to respondents, the court in *Williams* dismissed the claim against the union on the ground that the unions "had not 'acquiesced' in or agreed to the disputed practices" as "the union had aggressively pursued a grievance challenging the unlawful practice." Resp. Br. at 12. But the Seventh Circuit's opinion in *Williams* says nothing of the kind; what it says is that there is no union liability for "[m]ere failure by the unions to protect female employees from discriminatory Corporation policies." 492 F.2d at 405. Thus, contrary to respondents' argument, *Williams* holds that unions cannot be held liable merely for "acquiescing in" unlawful employer practices. *Williams* is therefore in square conflict with the decision below.[5]

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[5] The basis on which respondents attempt to distinguish *Williams*, as discussed in text, provides still further confirmation that, even in respondents' view, the decision below in the instant case holds the union liable for mere "acquiescence," which is to say for failure to act to prevent the employer from discriminating. Indeed according to respondents the union in *Williams* would have been liable for the employer's discrimination had the union not "aggressively pursued a grievance."

3. Finally, respondents suggest that the union here "expressly endorsed" the rule of law applied by the courts below. Resp. Br. at 11. Once again respondents are mistaken.

What the union "endorsed" in the lower courts was the rule that was applied by the Fifth Circuit in *Terrell*: a union which, in collective bargaining, agrees to an unlawful contractual provision must, to avoid liability for its wrong, make every reasonable step to stop the discrimination. The union's briefs below carefully distinguished such a case from one in which the employment practice at issue was unilaterally adopted by the employer, arguing that in this latter situation section 703 (c) (3) cannot be violated unless there is "some action, some urging, some participation in the result by the union." Petition for Rehearing, at 2. The union explained:

> While the Molders accept the "*Terrell* test" with respect to those employment practices as to which the Union actively participates in creating, such as seniority systems, and the impact of which is overt and apparent, *we cannot accept the logic or fairness of applying the same test to a practice which the Union emphatically and undeniably did not promote.* [*Id.* at 3 (emphasis added)] [6]

The union made the same point in its brief to the panel. *See* Union's Br. in C.A. No. 85-7008 at 48-49; Union's Reply Br. in C.A. No. 85-7008 at 8.

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[6] Respondents conveniently quote only the first half of this passage, omitting the underscored portion. Resp. Br. at 9 n.3. Respondents likewise mischaracterize the position taken in the Union's Reply Br. below at 8 where we argued:

> There is no case holding a union liable for an employers [*sic*] employment practices to which the union does not explicitly agree, typically by agreeing to incorporate the illegal provisions in a collective bargaining agreement. The "all reasonable means" test of such cases as *Terrell v. U.S. Pipe*, 644 F.2d 1112 (5th Cir. 1981), are all seniority system cases in which the system was held to be non-bona fide and to which the union has assented by means of a contract. . . . Because a union

Thus, the position we urge here was expressly advanced below. Equally clearly, that position was rejected by the lower courts. And for the reasons set forth in our petition—reasons which respondents essentially ignore—the holding below that unions are required to "take every reasonable step" to prevent employer discrimination merits plenary review by this Court.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition should be granted and a writ of certiorari should issue to review the decision of the court of appeals in this case.

Respectfully submitted,

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participated in creating a seniority system which discriminates, it has an obligation to remove the effects of the system they made in part. *But in the absence of participation or agreement, a union should not have to pay damages.* [Emphasis added]

Finally, respondents attribute to the union the statement that "a union need not successfully end a discriminatory practice to avoid liability—it need only oppose the practice." Resp. Br. at 9 n.3. That statement was made by the union as part of an alternative argument that even if Title VII required a union to combat discrimination by employers, that duty would be satisfied if the union "oppos[ed] the practice" and would not require the union to take "every reasonable step" in opposition. Union's Br. in C.A. No. 85-7008 at 50-51. *See* Pet. at 12-13 n.11.